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Supreme Court, U.S.
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In The
Supreme Court of the United States

COUNTY OF ORANGE,

Petitioner,

vs.

FRED PIERCE, TIMOTHY LEE CONN, FERMIN VALENZUELA, and LAURIE D. ELLERSTON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit has established an unwarranted bright-line rule of constitutional liability and created a stark inter-circuit conflict by holding that providing inmates in administrative segregation with 90 minutes of dedicated exercise time per week constitutes cruel and unusual punishment.

2. Whether the Ninth Circuit disregarded longstanding and controlling precedent established by *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564 (1985) and failed to afford the required deference to the District Court's factual findings reached after a six-day bench trial.

3. Whether the Ninth Circuit's holding that the County of Orange violated 42 U.S.C § 12132 of the Americans with Disabilities Act by not offering to physically disabled inmates housed at one detention facility every program and activity offered at two other detention facilities, threatens to dramatically disrupt and reduce the scope of programs and activities offered by umbrella organizations throughout the country.

LIST OF PARTIES (Rule 14.1(b))

The petitioner is the County of Orange of California, which was a defendant and appellee in the proceedings below. Fred Pierce, Timothy Lee Conn, Fermin Valenzuela, and Laurie D. Ellerston were the plaintiffs and appellants below.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES (Rule 14.1(b))	ii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL/STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
I. DISTRICT COURT PROCEEDINGS	4
II. NINTH CIRCUIT PROCEEDINGS	6
REASONS FOR GRANTING THE PETITION	8
I. THE ANNOUNCEMENT OF A BRIGHT-LINE RULE THAT NINETY MINUTES OF WEEKLY EXERCISE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT HAS CREATED AN INTER-CIRCUIT CONFLICT THAT REQUIRES IMMEDIATE ATTENTION	8
II. THE DISTRICT COURT'S FACTUAL FINDINGS WERE NOT AFFORDED THE DUE DEFERENCE MANDATED BY THIS COURT IN *ANDERSON v. CITY OF BESSEMER CITY*	15
A. Differences Of Opinion Do Not Justify The Reversal Of A District Court's Factual Findings	16

TABLE OF CONTENTS – Continued

Page

B. The District Court's Factual Findings, Based On Its Deliberations Of The Relevant And Competing Evidence Presented At Trial, Should Not Have Been Disturbed 23

III. REQUIRING INMATE PROGRAMS OFFERED AT EVERY OTHER JAIL FACILITY TO BE OFFERED TO PHYSICALLY DISABLED INMATES HOUSED AT ONE FACILITY WILL INVARIABLY CAUSE THE DRASTIC REDUCTION OR OUTRIGHT ELIMINATION OF SUCH PROGRAMS 27

IV. CONCLUSION 33

APPENDIX:

Amended Opinion of the United States Court of Appeals for the Ninth Circuit, *Pierce v. County of Orange,* 526 F.3d 1190 (9th Cir. 2008) .....App. 1-86

Findings of Fact and Conclusions of Law of the United States District Court for the Central District of California, *Pierce, et al. v. County of Orange, et al.,* No. SA CV 01-0981 GLT (MLGx) (April 27, 2005).....App. 87-103

TABLE OF AUTHORITIES

Page

CASES

Amadeo v. Zant, 486 U.S. 214, 108 S.Ct. 1771 (1988) 16

Ambassador Hotel Co., Ltd. v. Wei-Chuan Investment, 189 F.3d 1017 (9th Cir. 1999) 22

Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 105 S.Ct. 1504 (1985) ..... *passim*

Bailey v. Shillinger, 828 F.2d 651 (10th Cir. 1987) 9, 11

Brown v. City of Los Angeles, 521 F.3d 1238 (9th Cir. 2008) 29

Brown v. McGinnis, 1998 WL 670028 (6th Cir. 1998) 11

Caldwell v. Miller, 790 F.2d 589 (7th Cir. 1986) 9

Cook v. City of Chicago, 192 F.3d 693 (7th Cir. 1999) 22

Davenport v. DeRobertis, 844 F.2d 1310 (7th Cir. 1988) 13

French v. Owens, 777 F.2d 1250 (7th Cir. 1985), *cert. denied*, 479 U.S. 817 (1986) 12

Guam v. Yang, 850 F.2d 507 (9th Cir. 1988) (en banc), overruled on other grounds, *United States v. Keys*, 133 F.2d 1282 (9th Cir. 1988) (en banc) 16

Henderson v. Lane, 979 F.2d 466 (7th Cir. 1997) 12

Holton v. City of Thomasville Sch. Dist., 425 F.3d 1325 (11th Cir. 2005) 22

TABLE OF AUTHORITIES – Continued

Page

Hosna v. Groose, 80 F.3d 298 (8th Cir. 1996).....12

Inglewood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 102 S.Ct. 2182 (1982).....22

Ledoux v. District of Columbia, 833 F.2d 368 (D.C. Cir. 1987).....16

Mickens v. Taylor, 535 U.S. 162, 122 S.Ct. 1237 (2002).....20

Missouri v. Jenkins, 495 U.S. 33, 110 S.Ct. 1651 (1990).....30

Peterkin v. Jeffes, 855 F.2d 1021 (3d Cir. 1988).....12

Pullman-Standard v. Swint, 456 U.S. 273, 102 S.Ct. 1781 (1982).....19

Purcell v. Gonzalez, 549 U.S. 1, 127 S.Ct. 5 (2006).....22

Rodgers v. Jabe, 43 F.3d 1082 (6th Cir. 1995).....9, 10, 11, 13

Ruiz v. Estelle, 679 F.2d 1115 (5th Cir. 1982).....12

Spain v. Procunier, 600 F.2d 189 (9th Cir. 1979).....13

Sprint/United Management Co. v. Mendelsohn, ___ U.S. ___, 128 S.Ct. 1140 (2008).....16, 20

Stewart v. Gates, 450 F.Supp. 583 (C.D. Cal. 1978).....5, 6, 8, 14

Tractebel Energy Marketing, Inc. v. AEP Power Marketing, Inc., 487 F.3d 89 (2d Cir. 2007).....22

United States v. Alpine Land & Reservoir Co., 697 F.2d 851 (9th Cir. 1983).....21

TABLE OF AUTHORITIES – Continued

Page

United States v. Cousins, 455 F.3d 1116 (10th Cir. 2006) 16

Wishon v. Gammon, 978 F.2d 446 (8th Cir. 1992) 10, 12

Women Prisoners of the D.C. Dep't of Corrections v. District of Columbia, 93 F.3d 910 (D.C. Cir. 1996) 12, 29, 30, 31

CONSTITUTION AND STATUTES

U.S. Const.:

Amend. VIII ..... *passim*

Amend. XIV 2, 8

18 U.S.C. § 3626(b)(3) 2, 14

28 U.S.C. § 1201(c) 1

28 U.S.C. § 1254(1) 2

42 U.S.C. § 12132 ..... 3, 29

42 U.S.C. § 1983 ..... 3, 4, 9, 14, 15

RULES

Federal Rules of Civil Procedure, Rule 52 ..... 16, 19, 22, 23

Federal Rules of Civil Procedure, Rule 52(a) 3, 17, 19

Federal Rules of Civil Procedure, Rule 52(a)(1)(6) 22

United States Supreme Court Rule 13.3 1

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, reported at 526 F.3d 1190 (9th Cir. 2008) and filed on May 15, 2008, is reprinted at Appendix ("App.") 1-86.[1] In this opinion, the Ninth Circuit entered an order denying the petition for rehearing *en banc* and amended certain sections of the original opinion reported at 519 F.3d 985 (9th Cir. 2008). The District Court's unreported Findings of Fact and Conclusions of Law, filed on April 27, 2005, is reprinted at App. 86-103.

JURISDICTION

The Court of Appeals for the Ninth Circuit denied a timely petition for rehearing *en banc*, filed an amended Opinion, and entered judgment on May 15, 2008. (App. 2-4.)

This petition is filed within 90 days of the entry of the judgment pursuant to 28 U.S.C. § 1201(c) and United States Supreme Court Rule 13.3. The jurisdiction of this Court to review the judgment

[1] The references herein to "App." are to the accompanying Appendix. References to the appellate record below will be referred to as "Ct. App. AER" (Appellants' Excerpts of Record") or "Ct. App. SER" (Appellees' Supplemental Excerpts of Record).

of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL/STATUTORY PROVISIONS INVOLVED

The statutory and constitutional provisions relevant to this petition are as follows:

1. The Eighth Amendment to the Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

2. The Fourteenth Amendment to the Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

3. 18 U.S.C. § 3626(b)(3) provides:

> Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further

than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

4. 42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

5. 42 U.S.C. § 12132 of the Americans with Disabilities Act provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

6. Federal Rules of Civil Procedure, Rule 52(a) provides in pertinent part:

> (a) Findings and Conclusions.
>
> (1) *In General.* In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and

> state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58.
>
> . . .
>
> (6) *Setting Aside the Findings.* Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

STATEMENT OF THE CASE

This action involved a multi-faceted challenge, under 42 U.S.C. § 1983 and the Americans with Disabilities Act ("ADA"), to various conditions of pre-trial confinement at the jail facilities operated by Defendant County of Orange ("the County") in Santa Ana, California. The subject jail facilities are the Men's and Women's Central Jail ("Central Jail"), James A. Musick Facility, and Theo Lacy Facility. (App. 7.)

I. DISTRICT COURT PROCEEDINGS

Plaintiffs Fred Pierce, Timothy Lee Conn, Fermin Valenzuela, and Laurie D. Ellerston ("Plaintiffs") originally asserted these claims in a proposed class action. (App. 9-10.) Plaintiffs sought certification of a

class consisting of pre-trial detainees who had allegedly experienced violations of certain rights addressed by 14 separate injunctive orders, regarding various conditions of pretrial detention, originally issued in *Stewart v. Gates*, 450 F.Supp. 583 (C.D. Cal. 1978) ("*Stewart*"). (App. 7-8, 10, 87-88.)

Plaintiffs also sought certification of a subclass of physically disabled detainees whose rights under the ADA had allegedly been violated. (App. 10-11.) Plaintiffs claimed that the County had violated the ADA by failing to address structural barriers and failing to provide "adequate access to various programs offered by the County's jails." (App. 9.) The ADA claim relating to inadequate access to programs was based on the fact that mobility and dexterity-impaired inmates (hereinafter referred to as "physically disabled") are housed at the Central Jail, along with non-disabled inmates, and that certain programs offered to inmates at the two other jail facilities are not offered at the Central Jail. (App. 67.)

This proposed class action ultimately proceeded to a bench trial as an equitable relief class action without damages claims and was ordered consolidated with *Stewart* over which the District Court had jurisdiction. (App. 11-12.) The District Court also received evidence regarding whether the existing *Stewart* orders should be revised, modified, or vacated. (App. 12-13.)

During the ensuing six-day bench trial, the parties presented percipient and expert witness testimony, and submitted written closing arguments and trial briefs addressing the effect of the competing evidence on the questions of liability. (Ct. App. AER 9517 (Vol. 34) – 9716 (Vol. 35).) After close of evidence and submission of written closing arguments, the District Court issued its "Findings of Fact and Conclusions of Law" – in which it concluded that the 14 *Stewart* orders were no longer necessary and that Plaintiffs had failed to establish entitlement to ADA relief. (App. 87-103.)

II. NINTH CIRCUIT PROCEEDINGS

Plaintiffs appealed, and in a published opinion, the Ninth Circuit affirmed most of the challenged rulings but reversed the termination of two of the *Stewart* orders (regarding access for administrative segregation detainees to religious services and two hours of exercise per week) and declared the County to be in violation of the ADA. (App. 52-75.) The reinstatement of the two *Stewart* injunctive orders was based on the Ninth Circuit's conclusion that: (1) there was "consistent denial of access to the chapel . . . and to religious advisers to those in administrative segregation"; and (2) 90 minutes of exercise per week for administrative segregation inmates constituted cruel and unusual punishment. (App. 41, 49.) The Ninth Circuit held that based on these findings, the two corresponding *Stewart* orders must be reinstated to prevent ongoing violations of federal rights. (App. 45,

49.) Reversal on these grounds necessarily entailed the conclusion that the District Court had "clearly erred" in reaching factual findings to the contrary after the six-day bench trial.

The Ninth Circuit also held that the District Court had clearly erred in finding that "'various inmate programs are also available to disabled inmates'" and that "disabled inmates had access to all programs" but for one drug rehabilitation program. (App. 68, 101.) The Ninth Circuit found that the inmate programs and services available at the James A. Musick and Theo Lacy Facilities were not equally available at the Central Jail, citing as examples programs in agriculture, woodworking, welding, and access to recreational activities such as softball fields and volleyball courts. (App. 69.) The Ninth Circuit concluded that disabled inmates at the Central Jail, "by virtue of their status as disabled – have no possibility of access to the superior services offered outside of the Central Jail Complex." (App. 69.) At the same time, the Ninth Circuit noted that "[t]he ADA does not require perfect parity among programs offered by various facilities that are operated by the same umbrella institution" and that "[t]here is no clear case authority" as to "whether the ADA permits an umbrella organization to exclude the disabled from particular facilities with superior programs and services, so long as there is one accessible facility with inferior programs." (App. 70.)

Nevertheless, the Ninth Circuit reversed and remanded the matter for further fact-finding, requiring the District Court to "examine the feasibility of

offering similar programs at the Central Jail, and the extent to which the programs offered at the Theo Lacy or Musick are capable of being offered at the Central Jail without eliminating those programs at Theo Lacy or Musick." (App. 72.)

Defendants sought petition for rehearing *en banc*, and on May 15, 2008, the Ninth Circuit denied the petition for rehearing *en banc* and amended its original Opinion. (App. 2-4.)

REASONS FOR GRANTING THE PETITION

I. THE ANNOUNCEMENT OF A BRIGHT-LINE RULE THAT NINETY MINUTES OF WEEKLY EXERCISE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT HAS CREATED AN INTER-CIRCUIT CONFLICT THAT REQUIRES IMMEDIATE ATTENTION.

The Eighth and Fourteenth Amendments provide baseline constitutional protections against cruel and unusual punishment, the deprivation of necessary medical care and nourishment, and other fundamental rights. There is *no* unanimity, however, as to the nature and scope of the right *to exercise* in the penal setting. Here, in reinstating the *Stewart* order regarding exercise as to administrative segregation

inmates,[2] the Ninth Circuit has created a stark circuit conflict and carved a bright-line into a legal landscape where such bright lines have been consistently eschewed. This holding – that "ninety minutes of exercise per week constitutes punishment for purposes of § 1983" – warrants immediate review. (App. 49.)

Constitutional claims based on the amount of exercise in the penal setting have involved policies ranging from less than one hour per week to five or more hours per week. In examining these claims, courts have consistently held that the required inquiry is necessarily *fact-specific*, resulting in diverse analyses and holdings, and the consistently stated mantra *against* bright-line demarcations. *See*, *Rodgers v. Jabe*, 43 F.3d 1082, 1088 (6th Cir. 1995) ("restrictions on exercise may violate the Eighth Amendment *under some circumstances*") (emphasis added); *Bailey v. Shillinger*, 828 F.2d 651, 653 (10th Cir. 1987) (while "some courts have held a denial of fresh air and exercise to be cruel and unusual punishment under certain circumstances . . . [n]one, however, has ruled that such a denial is per se an Eighth Amendment violation."); *see also*, *Caldwell v. Miller,* 790 F.2d 589, 600 (7th Cir. 1986) ("The Eighth Amendment does not provide a fixed formula for

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[2] This injunctive order requires "[r]ooftop exercise and recreation at least twice each week for a total of not less than 2 hours." (App. 86.)

determining whether the effect of particular conditions constitutes cruel and unusual punishment. . . .").

The divisive impact of the holding below that 90 minutes of exercise per week constitutes cruel and unusual punishment is clearly illustrated by cases from several circuits where very similar denial of exercise claims were rejected as having not stated a basis for constitutional relief. For example, in *Wishon v. Gammon*, 978 F.2d 446 (8th Cir. 1992), an inmate assigned to a state prison's protective custody unit claimed that the limitation of 45 minutes per week of out-of-cell recreation time constituted cruel and unusual punishment. *Id.* at 447-448. The Eighth Circuit affirmed the summary dismissal of this claim because the plaintiff "did not suffer any injury or decline in health resulting from his limited out-of-cell exercise time," and he had additional opportunities for out-of-cell activities, such as visiting and telephone calls. *Id.* at 449. Clearly, the Eighth Circuit's holding cannot be reconciled with the holding below that 90 minutes of exercise per week necessarily constitutes cruel and unusual punishment.

In *Rodgers*, 43 F.3d 1082, the Sixth Circuit granted prison officials qualified immunity against an administrative segregation inmate's claim that he had been subject to cruel and unusual punishment because he had not been provided with at least one hour of out-of-cell exercise per day, five days per week. *Id.* at 1088. The prison policy required "out-of-cell exercise one hour per day, five days a week – but *only every thirty days*." *Id.* at 1084 (emphasis added).

Qualified immunity was granted in light of the absence of any clearly defined constitutional minimums with respect to outdoor exercise – despite the fact that over a more than five-month period, the plaintiff had been allowed to exercise just 26 times (an average of just over one session per week). *Id.* at 1084, 1088. The Sixth Circuit reasoned that in its prior cases, it had not "specifically set a minimum of exercise required in order to avoid violating the Eighth Amendment's objective component[,]" and therefore, a reasonable prison official "would not have known that it was unconstitutional to limit a prisoner's exercise to one hour per week, five days a week every thirty days as a means of punitive sanction." *Id.* at 1086, 1088; *see also*, *Brown v. McGinnis*, 1998 WL 670028, *1 (6th Cir. 1998) (in a case challenging the same exercise policy as in *Rodgers*, qualified immunity granted because *Rodgers* "did not define the contours of a prisoner's right to exercise, and no case subsequent to *Rodgers* has clarified this right in such a way as to put the defendants in the present case on notice that they were violating [the plaintiff]'s rights by enforcing the policy at issue.").

The Ninth Circuit's holding also cannot be reconciled with *Bailey*, 828 F.2d 651, where the Tenth Circuit held that a state prisoner's constitutional rights were not violated when he was given access of *one hour per week* to an outdoor exercise facility. *Id.* at 653. In direct contrast with the decision below, the Tenth Circuit held that "[a]lthough this amount of exposure to exercise and fresh air is still restrictive,

we cannot say, *without more*, that it fails to satisfy the demands of the Eighth Amendment." *Id.* (emphasis added); *see also*, *Henderson v. Lane*, 979 F.2d 466, 469 (7th Cir. 1997) (granting prison officials qualified immunity because there was no clearly established right to more than one hour of exercise per week).[3]

These cases can be fairly considered to have formed a *potential* conflict with those cases where providing inmates with *greater* access to outdoor exercise has been held to be constitutional. *See*, *e.g.*, *Peterkin v. Jeffes*, 855 F.2d 1021, 1031-1032 (3d Cir. 1988) (holding that two hours per day of outdoor exercise is not cruel or unusual); *Ruiz v. Estelle,* 679

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[3] Moreover, the requirement that lack of exercise claims must be substantiated by proof of injury to the inmate's health is inherently inconsistent with the Ninth Circuit's holding – which does not contain any suggestion that actual injury is required to establish an Eighth Amendment violation. (App. 47-49.) The proof of injury requirement has been adopted by the Seventh, Eighth, and D.C. Circuits. *See*, *French v. Owens*, 777 F.2d 1250, 1255 (7th Cir. 1985), *cert. denied*, 479 U.S. 817 (1986) (lack of exercise may rise to a constitutional violation "where movement is denied and muscles are allowed to atrophy [and] the health of the individual is threatened"); *Hosna v. Groose*, 80 F.3d 298, 306 (8th Cir. 1996) (citing *Wishon v. Gammon*); *Women Prisoners of District of Columbia Dept. of Corrections v. District of Columbia*, 93 F.3d 910, 927, 320 (D.C. Cir. 1996) (an inmate's limited right to exercise is violated "only if 'movement is denied and muscles allowed to atrophy, [or] the health of the individual is threatened.'") (quoting *French v. Owens*). Here, Plaintiffs did not attempt to make any showing that they suffered injuries to their health as a result of the alleged insufficient access to outdoor exercise. (Ct. App. AER 9543-9547:4 (Vol. 34) [Plaintiffs' Closing Trial Brief]).

F.2d 1115, 1152 (5th Cir. 1982) (one hour of exercise per day upheld as not violating the Eighth Amendment); *Davenport v. DeRobertis*, 844 F.2d 1310, 1316 (7th Cir. 1988) (upholding determination that inmates in segregation should be given five hours of exercise time per week); *Spain v. Procunier*, 600 F.2d 189, 199 (9th Cir. 1979) (affirming requirement that inmates be accorded one hour of outdoor exercise, five days per week).[4]

While these cases demonstrate that similar weekly exercise restrictions survive constitutional scrutiny, they also *could* be characterized as establishing a minimum constitutional requirement. However, these Courts and others – including the Ninth Circuit – have been careful about not announcing any per se rule as to the amount of exercise that is constitutionally required. *See*, *Davenport*, 844 F.2d at 1316 ("[w]e do not suggest that this is always and everywhere the constitutional minimum" for the amount of outdoor exercise); *Rodgers*, 43 F.3d at 1087 (explaining that in its prior cases where the right to exercise had been addressed, it had "stopped short of endorsing that amount, or indeed *any* amount, as a constitutional requirement"); *Spain*, 600 F.2d at 199 ("we do not consider it necessary to decide whether deprivation of outdoor exercise is a per se violation of the eighth amendment").

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[4] The plaintiff in *Rodgers* proffered this argument in support of his Eighth Amendment claim – which was dismissed on qualified immunity grounds. *Rodgers*, 43 F.3d at 1087-1088.

In the decision below, the Ninth Circuit did not exercise similar caution. After concluding that "pretrial detainees in administrative segregation and other restrictive classifications, such as protective custody, are typically afforded, at best, only ninety minutes weekly in a space equipped for exercise," the Ninth Circuit summarily held that this amount of weekly exercise time "does not give meaningful protection of this basic human necessity" and "*constitutes punishment* for purposes of § 1983." (App. 47, 48, 49; emphasis added.) The Ninth Circuit reinstated the subject *Stewart* injunction "to correct a current and ongoing violation of [a] Federal right." (App. 49, quoting 18 U.S.C. § 3626(b)(3).)

The declaration that 90 minutes of weekly exercise constitutes cruel and unusual punishment has brought to an intense boil what up to now might have only been a simmering circuit conflict. Public entities throughout the Ninth Circuit (and perhaps the country) can now anticipate inmates to rely on the decision below to pursue 42 U.S.C. § 1983 actions based on the theory that they were subjected to cruel and unusual punishment because they were provided with exercise time inconsistent with the decision below.

Such claims would not be discouraged by the Ninth Circuit's statement that "we need not hold that there is a specific minimum amount of weekly exercise that must be afforded to detainees who spend the bulk of their time inside their cells," because the holding that was actually reached – that 90 minutes

of exercise per week constitutes cruel and unusual punishment – does precisely that. (App. 47-48.) This holding, therefore, establishes a bright-line rule regarding exercise access, while also creating a sharp rift with those circuits that have upheld the constitutionality of similar time limitations. The Ninth Circuit's proclamation of this bright-line standard, therefore, breeds immediate confusion and crystallizes a substantial circuit conflict that necessitates immediate review.

II. THE DISTRICT COURT'S FACTUAL FINDINGS WERE NOT AFFORDED THE DUE DEFERENCE MANDATED BY THIS COURT IN *ANDERSON v. CITY OF BESSEMER CITY*.

Plaintiffs went to trial on their 42 U.S.C. § 1983 and ADA claims, and after an exhaustive six-day bench trial, the District Court found in favor of the County. The District Court's factual findings were based on the testimony of 26 witnesses, including opposing expert witness testimony, the deposition testimony of many additional witnesses, and extensive pre-trial and post-trial briefing. (App. 88; Ct. App. AER 6202 (Vol. 23) – 7615 (Vol. 25), 7278 (Vol. 26) – 7615 (Vol. 27), 7907-7974 (Vol. 29).) In reversing several of these factual findings as clearly erroneous, the Ninth Circuit failed to follow longstanding and controlling precedent regarding the significant deference that must be afforded a district court's factual findings. The lack of adherence to these principles of

review leads to disruptive consequences, as evidenced by the instant case.

A. Differences Of Opinion Do Not Justify The Reversal Of A District Court's Factual Findings.

A court of appeals' misapplication of the "clearly erroneous" standard of review to a district court's factual findings has often served as the basis for certiorari review.[5] *See, e.g., Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 105 S.Ct. 1504 (1985); *Amadeo v. Zant*, 486 U.S. 214, 223, 108 S.Ct. 1771 (1988) (certiorari granted to review the Court of Appeals' failure to identify the standard of review applied to the district court's factual findings which are subject to a deferential clearly erroneous standard of review); *Sprint/United Management Co. v. Mendelsohn*, ___ U.S. ___, 128 S.Ct. 1140 (2008).[6]

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[5] The "clearly erroneous" standard of review is codified in Federal Rules of Civil Procedure, Rule 52 ("Rule 52").

[6] Courts of appeal have also often addressed, on rehearing, erroneous applications of the subject standard of review. *See, Guam v. Yang*, 850 F.2d 507 (9th Cir. 1988) (en banc), overruled on other grounds, *United States v. Keys*, 133 F.2d 1282 (9th Cir. 1988) (en banc) (rehearing granted, in part, to determine the correct standard of review for interpretation of Guam law); *Ledoux v. District of Columbia*, 833 F.2d 368 (D.C. Cir. 1987) (rehearing *en banc* granted in part to determine "[w]hat deference" is owed "to the findings of the District Court under Title VII and the Constitution"); *United States v. Cousins*, 455 F.3d 1116 (10th Cir. 2006) (rehearing granted to determine the

(Continued on following page)

In *Anderson*, 470 U.S. 564, this Court closely examined the nature and extent of the deference that must be afforded to a district court's factual findings, pursuant to Rule 52(a), which provided at that time: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." *Id.* at 573. This explanation was set forth in conjunction with the determination of whether the Court of Appeals had erred "in holding the District Court's finding of discrimination to be clearly erroneous." *Id.*

In *Anderson*, the plaintiff was the only woman of eight applicants for the city's recreation director. *Id.* at 567. Believing that she was not hired for discriminatory reasons, the plaintiff filed a Title VII action, and after a two-day bench trial, the district court "issued a brief memorandum of decision" explaining its finding that the plaintiff had not been hired "on account of her sex." *Id.* at 568. The district court subsequently issued its findings of fact and conclusions of law, including the conclusion that the plaintiff "had been better qualified than [the male applicant who had been hired] to perform the range of duties demanded by the position." *Id.* The district court reached this conclusion by considering the applicants' educational and professional backgrounds

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correct standard of review for a district court's Fourth Amendment analysis).

and the plaintiff's "greater breadth of experience [that] made her better qualified for the position." *Id.* at 569. The district court also found that the male members of the hiring committee were biased against the plaintiff because she was a woman, as evidenced by the testimony of one of the committee members and the questioning of the plaintiff about her family's reaction. *Id.* at 569-570. On appeal, the Fourth Circuit reversed the finding of discrimination by finding that the district court had clearly erred in reaching three findings: (1) that the plaintiff was the most qualified; (2) that the plaintiff had been asked questions that other applicants were not; and (3) that the male committee members were biased against hiring women. *Id.* at 571.

Certiorari was granted to review the Court of Appeals' failure to afford proper deference to the district court's factual findings. In reversing the Fourth Circuit, this Court explained:

> . . . [C]ertain general principles governing the exercise of the appellate court's power to overturn findings of a district court may be derived from our cases. The foremost of these principles . . . is that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). This standard plainly does *not* entitle a reviewing court to

> reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. *The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court.* "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo.*" *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed.2d 129 (1969). If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.* [Citations omitted.]

Anderson, 470 U.S. at 573-574 (emphasis added).

This Court explained further that these principles of appellate review govern district courts' findings based on "physical or documentary evidence or inferences from other facts" and that Rule 52's limitations are not limited to credibility determinations. *Id.* at 574 (citing *Pullman-Standard v. Swint,* 456 U.S. 273, 287, 102 S.Ct. 1781, 1789 (1982) (Rule 52(a) "does not make exceptions or purport to exclude

certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous.")).

Further judicial guidance was provided: "[d]uplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much." *Anderson*, 470 U.S. at 574-575; *see also*, *Mickens v. Taylor*, 535 U.S. 162, 177, 122 S.Ct. 1237, 1246 (2002) ("Our role is to defer to the District Court's factual findings unless we can conclude they are clearly erroneous."); *Sprint/United Management Co.*, 128 S.Ct. at 1144-1145 ("[In] deference to a district court's familiarity with the details of the case and its greater experience in evidentiary matters, *courts of appeals afford broad discretion to a district court's evidentiary rulings*.") (emphasis added).

In applying these principles of review, this Court held that the Fourth Circuit had "improperly conducted what amounted to a *de novo* weighing of the evidence in the record." *Anderson*, 470 U.S. at 576. Comparing the two diverse interpretations of the record, this Court explained that "we cannot say that either interpretation of the facts is illogical or implausible. Each has support in inferences that may be

drawn from the facts in the record; and if either interpretation had been drawn by a district court on the record before us, we would not be inclined to find it clearly erroneous. . . . When the record is examined in light of the *appropriately deferential standard*, it is apparent that it contains nothing that mandates a finding that the District Court's conclusion was clearly erroneous." *Id.* at 577 (emphasis added). This Court concluded its examination by articulating the dimensions of a common judicial reality:

> Even the trial judge, who has heard the witnesses directly and who is more closely in touch than the appeals court with the milieu of which the controversy before him arises, cannot always be confident that he "knows" what happened. Often, he can only determine whether the plaintiff has succeeded in presenting an account of the facts that is more likely to be true than not. *Our task – and the task of appellate tribunals generally – is more limited still*: we must determine whether the trial judge's conclusions are clearly erroneous.

Id. at 580-581 (emphasis added).

Accordingly, appellate courts have consistently recognized and applied this deferential standard for reviewing a district court's factual findings. For example, in *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851 (9th Cir. 1983), the Ninth Circuit held that a district judge's findings "made in reliance on *controverted expert testimony*, will not be disturbed

unless clearly erroneous" and noted its "narrow scope of review when we review a factual determination of a district court that does not evince any misapprehension of relevant legal standards." *Id.* at 857 (emphasis added) (citing *Inglewood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 102 S.Ct. 2182, 2188 (1982)); *see also*, *Tractebel Energy Marketing, Inc. v. AEP Power Marketing, Inc.*, 487 F.3d 89, 99 (2d Cir. 2007) ("We may not set aside the district judge's findings of fact during a bench trial unless they are clearly erroneous."); *Cook v. City of Chicago*, 192 F.3d 693, 697 (7th Cir. 1999) ("reasonable doubts should be resolved in favor of the district judge's ruling in light of his greater immersion in the case"); *Ambassador Hotel Co., Ltd. v. Wei-Chuan Investment*, 189 F.3d 1017, 1024 (9th Cir. 1999) ("Review under the clearly erroneous standard requires *considerable deference*. . . . The appellate court *may not substitute its judgment* for that of the district court.") (emphasis added); *Holton v. City of Thomasville Sch. Dist.*, 425 F.3d 1325, 1350 (11th Cir. 2005) ("Clear error is a highly deferential standard of review."); *Purcell v. Gonzalez*, 549 U.S. 1, 127 S.Ct. 5, 7 (2006) (citing Rule 52 in explaining that the Ninth Circuit owed deference to the district court's ultimate findings).

These clearly-defined rules regarding the requisite level of deference closely parallel the language and requirements of Rule 52(a)(1)(6), which provides that the "[f]indings of fact, whether based on oral or other evidence, *must not be set aside unless clearly erroneous*, and the reviewing court must give *due*

regard to the trial court's opportunity to judge the witnesses' credibility." (Emphasis added.)[7] The reversal below conformed with neither these statutory requirements, nor with this Court's pronouncements in *Anderson* and the attendant case law.

B. The District Court's Factual Findings, Based On Its Deliberations Of The Relevant And Competing Evidence Presented At Trial, Should Not Have Been Disturbed.

In reversing the District Court's factual findings for clear error, the Ninth Circuit transgressed far beyond the longstanding boundaries of review and engaged in inappropriate second-guessing. The District Court's findings had necessarily been the product of its overall assessment, as the trier-of-fact, of the competing evidence and conflicting witness testimony presented throughout the bench trial. Therefore, even if the Court below concluded that

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[7] The Advisory Committee Notes to Rule 52 explained the argument for a "more searching appellate review" of a district court's findings is "outweighed by the public interest in the stability and judicial economy that would be promoted by *recognizing that the trial court, not the appellate tribunal, should be the finder of the facts.* To permit courts of appeals to share more actively in the fact-finding function would tend to *undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority.*" (Emphasis added.)

they would have ruled differently had they been in the District Court's position, such a difference of opinion does not warrant the reversal of these findings.

That the District Court's findings should have been insulated from such heavy-handed review is evident from the substance of the subject ruling:

> In summary[,] concerning access to programs, there was an inadequate showing of the "reasonableness" of requiring modifications. The *facts taken as a whole* show the County is acting in a reasonable manner, *making programs readily accessible and usable, with due regard to legitimate penological interests*. . . . Programs, activities, and facilities are *readily accessible* and usable without "mainstreaming." (App. 101; emphasis added.)

These findings were invariably based on the District Court's consideration of competing evidence, such as the testimony of Captain Board who testified that physically disabled inmates have access to rehabilitation, work and educational programs (such as high school equivalency and computer classes) at the Central Jail and explained the security and safety concerns associated with housing physically disabled inmates. (App. Ct. App. SER 13204-13206, 13211:7-25 (Vol. 44).)[8] The District Court found that "this

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[8] Specifically, Captain Board testified that housing wheelchair-bound inmates with general population inmates would be

(Continued on following page)

legitimate penological interest was not rebutted." (App. 101.)

Despite the presentation of substantial evidence to support the District Court's findings related to the availability of programs and services at the Central Jail, the Ninth Circuit reversed and found that the evidence below had actually established the exact opposite scenario – a violation of the ADA and the need for further fact-finding upon remand. Usurping the District Court's factual determinations in this manner constitutes a blatant disregard of this Court's instructions in *Anderson* and also cannot be reconciled with the application of the clearly erroneous standard of review in the myriad of cases since *Anderson*.

The Ninth Circuit's failure to adhere to these principles of review was not limited to the District Court's finding regarding access to jail programs but also the District Court's finding as to the "physical barrier" component of Plaintiffs' ADA claim. In finding against Plaintiffs on this part of their ADA claim, the District Court held that the testimony of inmate witnesses and Plaintiffs' expert witness, Peter Robertson (regarding certain architectural barriers

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dangerous because the wheelchair-bound inmates would have "a limited ability to protect themselves from the other inmates." (Ct. App. SER 13204:23-13206:4 (Vol. 44).) Captain Board also testified that disabled inmates are not excluded from the Community Work Program. (Ct. App. SER 13209:15-13210 (Vol. 44).)

and features) did not justify declaratory or injunctive action because there was no analysis, cost study, or proposal about how effective modifications could be made. (App. 99-100.) Mr. Robertson's testimony was also found to have been "broad conclusory statements," and his testimony therefore, was of "limited value." (App. 100.)

Moreover, the District Court ruled:

> Where structural corrections were not yet accomplished, *there was no significant Plaintiffs' showing that other methods were ineffective in achieving compliance*, while there was significant defense evidence that other curative methods were effective. *The evidence shows certain areas of ADA noncompliance are within the reasonable requirements of effective prison administration.* (App. 100; emphasis added.)

Thus, the District Court's ruling was unquestionably based on its assessment of the limited probative value of Plaintiffs' evidentiary showing. In concluding that this ruling was clearly erroneous, the Ninth Circuit relied almost exclusively on the testimony of the same expert witness whose testimony the District Court found to be ineffective and limited. (*See*, App. 61-62, 65-66.) The fact that the Ninth Circuit would have afforded more weight to this testimony or found the testimony to have been more compelling than did the District Court does not justify reversing the District Court on the ground that its findings were not supported by the record.

The District Court weighed this testimony against the other relevant evidence and concluded that the testimony did not allow Plaintiffs to meet their burden of proof at trial.

The District Court's factual findings, therefore, should not have been disturbed on appeal where such findings must be afforded significant deference and where mere disagreement about what the evidence showed does not warrant reversal of the trier-of-fact's factual findings.

III. REQUIRING INMATE PROGRAMS OFFERED AT EVERY OTHER JAIL FACILITY TO BE OFFERED TO PHYSICALLY DISABLED INMATES HOUSED AT ONE FACILITY WILL INVARIABLY CAUSE THE DRASTIC REDUCTION OR OUTRIGHT ELIMINATION OF SUCH PROGRAMS.

Review is also necessary to determine whether a public entity should be required under the ADA to provide disabled inmates with access to its entire array of jail programs and services – including those programs and services available at facilities where disabled inmates are *not* housed. The Ninth Circuit's holding and analysis can and will almost assuredly be interpreted to mean that a public entity violates the ADA if its detention and correctional facilities do not provide disabled inmates access to programs and benefits offered at *every one of its facilities* – even if disabled inmates, for legitimate reasons, are housed

in a *single facility*. If left alone, the decision below will compel public entities that operate more than one jail or prison facility to drastically reduce or eliminate valuable inmate programs and activities just to avoid ADA claims arising from facilities where every inmate program or activity cannot be offered.

The Ninth Circuit recognized that there were legitimate reasons for housing physically disabled detainees in a central location (due in part to their specific medical and security needs), and that the "ADA does not require perfect parity among programs offered by various facilities that are operated by the same umbrella institution." (App. 70.) Yet, the Ninth Circuit also concluded that the County "may not shunt the disabled into facilities where there is no possibility of access to those programs [available at the other facilities]." (App. 70.) The Ninth Circuit reached this conclusion, while at the same time, acknowledging that "[t]here is *no clear case authority on this precise point* – whether the ADA permits an umbrella organization to exclude the disabled from particular facilities with superior programs and services, *so long as there is one accessible facility with inferior programs*." (App. 70; emphasis added.)

Without controlling case law on the question of whether the same programs and activities must be made available at every facility operated by an umbrella organization, the Ninth Circuit held that the ADA does not permit any lack of uniformity, thereby setting the stage for ADA claims based on any such

program-related disparities. Blanket uniformity, however, should not be mandated under the ADA.

In the instant case, there was no dispute that inmates (whether disabled or not) were offered programs and activities at the Central Jail. The fact that the spectrum of these programs and activities did not exactly mirror the spectrum of programs and activities at the other two facilities where disabled inmates are not housed, should not subject public entities to ADA liability. Such a cumbersome application of the ADA – especially where detention facilities are involved – is wholly unsupported by "clear case authority" and will undoubtedly have a severe impact on custody facilities unable to offer ADA-governed programs in an across-the-board fashion. Indeed, physically disabled inmates at the Central Jail are not denied access to programs and activities *because* of their disabilities but because they cannot be housed anywhere but the Central Jail. Thus, the circumstances in the instant case do not implicate the direct causal nexus necessary for relief under 42 U.S.C. § 12132. *See, e.g., Brown v. City of Los Angeles*, 521 F.3d 1238, 1241 (9th Cir. 2008) (to prevail under Title II of the ADA, the plaintiff must show that the challenged policy "discriminates 'by reason of' their disabilities").

In a remarkably analogous setting, the D.C. Circuit in *Women Prisoners of the D.C. Dep't of Corrections v. District of Columbia*, 93 F.3d 910 (D.C. Cir. 1996) ("*Women Prisoners*"), addressed the implications of requiring jail administrators to implement

inmate programs equally across multiple facilities. The D.C. Circuit recognized that as opposed to fostering benefits to the inmates as a whole, such an approach will force jail administrators to choose between all or nothing, and realistically, the choice of nothing will invariably prevail. *Id.* at 927.

The plaintiffs in this class action were female inmates at three separate facilities operated by the District of Columbia, and the women at two of these facilities alleged, among other things, "discrimination in access to academic, vocational, work, recreational, and religious programs." *Id.* at 913. After a three-week bench trial, the district court found multiple violations of federal and local law and issued an opinion with many findings, such as that the male inmates at two facilities "had greater recreational opportunities" than did the women. *Id.* at 914, 916. The District Court ordered the District of Columbia to "ensure that the women have access to the same opportunities and programs that are available to similarly situated men at other prisons." *Id.* at 917.

The D.C. Circuit prefaced its analysis by stating that "federal courts must *move with caution* when called upon to deal with even serious violations of law by local prison officials." *Id.* at 919 (emphasis added) (citing *Missouri v. Jenkins*, 495 U.S. 33, 51, 110 S.Ct. 1651, 1663 (1990) ("one of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions.")).

The D.C. Circuit exercised such caution in reviewing the defendants' challenge to the district court's order that they "upgrade the work, recreational, and religious programs available to female inmates" – an order that was based on the finding that the disparities in these programs violated the female inmates' equal protection rights. *Id.* at 924. The D.C. Circuit held that the equal protection claim could not be based on the fact that more programs were available to men at another facility because "[it] is hardly surprising, let alone evidence of discrimination, that the smaller correctional facility *offered fewer programs than the larger one*." *Id.* at 925 (emphasis added). Further, the D.C. Circuit recognized that the District of Columbia "could, entirely consistent with the Constitution, deprive male and female inmates of virtually *all programs they now enjoy*[,]" and "[i]f federal courts could find equal protection liability whenever male and female inmates have access to different sets of programs, *budget-strapped prison administrators may well respond by reducing, to a constitutional minimum, the number of programs offered to all inmates*." *Id.* (emphasis added).

This analysis is just as apt in the instant case since such an unfortunate result is precisely what might await detainees and inmates in the County's custody – specifically, the vast reduction or elimination of programs offered to all detainees and inmates to avoid ADA liability arising from the housing of physically disabled detainees and inmates at the Central Jail. The County operates two detention facilities in

addition to the Central Jail, and it is true that certain programs and services are available at these facilities that are not available at the Central Jail. In order to avoid suits alleging ADA claims, those programs and activities made available to inmates at the other two facilities face wholesale elimination. Moreover, this dynamic will be magnified by the fact that the County's jail facilities house mostly pretrial detainees, and as opposed to prisons, house individuals for short periods of time. The impetus will therefore be that much stronger to eliminate inmate programs and activities to avoid ADA claims based on any disparity in the programs offered at the County's jail facilities.[9]

Consequently, the net effect of the Ninth Circuit's ADA analysis, with respect to programs and services, is that public umbrella organizations throughout the Ninth Circuit (and invariably throughout the country) will be faced with the bureaucratic and logistical quandary of having to juggle and revamp their programs and services to insulate themselves from ADA claims based on disparities that may exist from facility to facility.

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[9] State-wide prison systems certainly would not be immune from the practical effects of the Ninth Circuit's application of the ADA. A physically disabled inmate at one prison would have a colorable ADA claim if he or she were to allege that physically disabled inmates at another facility are afforded access to a certain program, service, or activity that is not made available to him or her.

Review, therefore, is necessary to address the propriety of such a counter-productive and counter-intuitive application of the ADA – which if left unchecked, will force many more public entities to choose between defending themselves against an overwhelming stream of ADA claims or eliminating worthwhile programs and services to protect themselves from such claims.

IV. CONCLUSION

The petition for writ of certiorari should therefore be granted.

Respectfully submitted,

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August 13, 2008

526 F.3d 1190

United States Court of Appeals, Ninth Circuit.

Fred PIERCE; Timothy Lee Conn; Fermin Valenzuela; Laurie D. Ellerston, Plaintiffs-Appellants,

v.

COUNTY OF ORANGE, a Governmental entity; Michael S. Carona, individually, Defendants-Appellees.

Richard Eugene Smith; Kenneth Wilson; William Brown; Susan Young, on behalf of themselves and all others similarly situated, Plaintiffs, and Jerry E. Stewart; Fred Pierce; Timothy Lee Conn; Fermin Valenzuela; Laurie D. Ellerston, Plaintiffs-Appellants,

v.

Brad Gates, individually and in his official capacity as Orange County Sheriff; William Wallace, individually and in his official capacity as Chief Deputy of the Orange County Sheriffs Department and Jail Division; County of Orange, a governmental entity; Michael S. Carona, individually, Defendants-Appellees.

Nos. 05-55829, 05-55845.

Argued and Submitted April 12, 2007.
Filed March 24, 2008.
Amended May 15, 2008.

Virginia Keeny and Dan Stormer, Pasadena, CA, and Richard P. Herman, Newport Beach, CA, for the plaintiffs-appellants.

Steven C. Miller, Santa Ana, CA, David D. Lawrence and Christina Sprenger, Orange, CA, for the defendants-appellees.

Appeal from the United States District Court for the Central District of California; Gary L. Taylor, District Judge, Presiding. D.C. Nos. CV-01-00981-GLT, CV-75-03075-GLT.

Before: B. FLETCHER, M. MARGARET McKEOWN, and JAY S. BYBEE, Circuit Judges.

ORDER

The opinion filed on March 24, 2008 and published at 519 F.3d 985 (9th Cir. 2008), is AMENDED as follows:

(1) At 519 F.3d at 1016, after the sentence ending, "with or without reasonable accommodations, meet the essential eligibility requirements to participate," insert the following additional two sentences:

> Whether this "program access" standard may reasonably be met or whether any restriction on access is reasonably related to a legitimate government objective is necessarily fact-specific. We also emphasize that the district court should look at the offerings as a whole and in their entirety and thus the court is not required to ensure that each individual program or service offered at Theo Lacy

> and Musick is offered in complete parity with an offering at the Central Jail.

(2) At 519 F.3d at 1016, delete the sentence reading, "In particular, the district court should examine the extent to which the programs offered at Theo Lacy and Musick are capable of reassignment to the Central Jail without eliminating those programs at Theo Lacy or Musick." Replace the deleted sentence with the following three sentences:

> In particular, the district court should examine the feasibility of offering similar programs at the Central Jail, and the extent to which the programs offered at Theo Lacy or Musick are capable of being offered at the Central Jail without eliminating those programs at Theo Lacy or Musick. There may be other appropriate remedies that provide disabled inmates access to programs and services, and the district court should consider those options as well. Our intention is not to suggest or cause the termination or diminution of programs or facilities other than the Central Jail, but to have the district court explore available options on a full evidentiary record.

Judges McKeown and Bybee have voted to deny the petition for rehearing en banc, and Judge Fletcher has so recommended. The petition for en banc rehearing has been circulated to the full court, and no judge has requested a vote on whether to rehear the matter en banc. Fed.R.App.P. 35(b). The

petition for rehearing en banc is denied. No further petitions for rehearing or rehearing en banc will be accepted.

IT IS SO ORDERED.

OPINION

BETTY B. FLETCHER, Circuit Judge:

In 2001, plaintiffs-appellants Fred Pierce, Timothy Lee Conn, Fermin Valenzuela, and Laurie D. Ellerston – pre-trial detainees in Orange County's jail facilities – initiated *Pierce v. County of Orange,* No. 05-55829 (D.Ct. No. 01-981), a class action suit against the County of Orange and Michael S. Carona, the county's sheriff and agent.[1] Seeking relief under 42 U.S.C. § 1983 for violations of their Fourteenth Amendment due process rights, plaintiffs contend, in essence, that the Orange County jails are operated in an unconstitutional manner, depriving them of opportunities for exercise, unduly limiting their access to common areas, and impermissibly restricting their ability to practice religion. Plaintiffs further assert that they have been deprived of a number of the federal rights previously recognized in *Stewart v. Gates,* 450 F.Supp. 583 (C.D. Cal. 1978) ("*Stewart*") – a

[1] Plaintiffs' claims against Carona were dismissed, leaving the County as the sole defendant-appellee involved in this consolidated appeal. In a separate order, we grant Carona's motion to dismiss the plaintiffs' appeal as untimely with respect to him.

decision and resulting injunctive orders ("the *Stewart* orders" or "the *Stewart* injunction") that established standards for pre-trial detention in Orange County jails. The plaintiffs seek relief for the same injuries under the California Constitution, as well as Title 15 of the California Code of Regulations (which sets minimum standards for county jails) in violation of § 815.6 of the California Government Code, and breach of § 54.1 of the California Civil Code. Finally, the plaintiffs in *Pierce* assert an equal protection claim under § 1983 based on the denial of equal treatment to disabled detainees, and they advance a separate claim for violations of Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131 *et seq.*, alleging non-compliant jail facilities and denial of access to programs and services available to non-disabled detainees. On appeal, the plaintiffs also challenge a number of the district court's pre-trial procedural and evidentiary rulings.

After a six day trial, the district court found that the plaintiffs had failed to establish any constitutional injury giving rise to relief under § 1983. The district court went on to find that the fourteen *Stewart* orders at issue were no longer necessary, and ordered them all terminated pursuant to the Prison Litigation Reform Act ("PLRA"),[2] 18 U.S.C.

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[2] Pub.L. No. 104-134, §§ 801-810, 110 Stat. 1321, 1321-66 to 1321-77 (1996) (codified at 11 U.S.C. § 523 (2000); 18 U.S.C. §§ 3624, 3626 (2000); 28 U.S.C. §§ 1346, 1915, 1915A, 1932 (2000); 42 U.S.C. §§ 1997a-1997h (2000)).

§ 3626(b)(3). The district court likewise rejected plaintiffs' equal protection and ADA claims, finding that although the County was not in "full ADA compliance, [] it can reasonably be expected to move toward full compliance."

Having conducted a thorough review of the extensive pre-trial and trial record, we affirm in part and reverse in part. We affirm the district court's pre-trial and evidentiary rulings challenged by the plaintiffs; the district court did not abuse its discretion in its pre-trial management of the case or its decisions related to the admission of evidence. On the merits, we affirm the district court's termination of nearly all of the fourteen *Stewart* orders at issue. Two of those orders, however, which secure inmates housed in administrative segregation some minimal access to religious services and exercise, may not be terminated. The district court clearly erred in its finding that these two orders are unnecessary to correct a current and ongoing violation of a Federal right. We likewise conclude that, because of physical barriers that deny disabled inmates access to certain prison facilities (bathrooms, showers, exercise and other common areas), and because of disparate programs and services offered to disabled versus non-disabled inmates, the County is in violation of the ADA.

I. PLAINTIFFS' ALLEGATIONS

A. Violation of the *Stewart* orders governing prison conditions.

Stewart v. Gates was commenced in 1975 when a class of pre-trial detainees challenged the constitutionality of various practices and conditions of confinement in the Orange County Central Jail in Santa Ana, California. 450 F.Supp. 583 (D.C. Cal. 1978). In 1978, the district court presiding over the case issued an injunction, establishing various standards for pre-trial detention. *Id.* at 590-91 (holding that the court retained jurisdiction to modify the orders upon a showing of good cause). In 1991, the district court made clear that the order applied to all of the Orange County jails: Men's Central Jail, Women's Central Jail, Intake Release Center, James A. Musick Facility, and Theo Lacy Facility.

The *Stewart* orders – which have been modified in the years since the initial injunction was issued – address detainees' access to telephones, law books, reading materials, and interjail mail to jailhouse lawyers; provide for mattresses, beds, and blankets; establish mealtimes and sleeptimes; require seating while awaiting transport to and from court; and set population caps. The orders also address several issues pertaining specifically to inmates in administrative segregation: their access to religious services,

day rooms, exercise, and visitors.[3] The *Stewart* orders subject to challenge in this litigation are reproduced as Appendix A to this opinion. Specifically, plaintiffs in *Pierce* maintain that they have been subjected to holding-cell conditions deemed unconstitutional in *Stewart* and have been denied the minimum meal-time held to be constitutionally required in *Stewart*. In addition, plaintiffs contend that inmates housed in administrative segregation are denied the minimum access to religious services, the day room, and exercise that *Stewart* held to be constitutionally required. Plaintiffs sought relief for the alleged violations pursuant to § 1983. Attacking the same conduct, plaintiffs also allege due process violations under the California Constitution, breach of mandatory duties under Title 15 of the California Code of Regulations (which sets minimum standards for county jails) in violation of § 815.6 of the California Government Code, and breach of § 54.1 of the California Civil Code.

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[3] Administrative segregation applies to inmates "who are determined to be prone to: escape; assault staff or other inmates; disrupt the operations of the jail, or likely to need protection from other inmates." Cal. Code Regs. Tit. 15, § 1053. This encompasses the definitions of both Administrative Segregation and Protective Custody. According to the testimony of County witness Sergeant Rich Himmel, inmates who have "violent tendencies and have been deemed a threat to Department staff or other inmates," are classified as "Administrative Segregation."

The County, meanwhile, sought termination of the *Stewart* orders in their entirety pursuant to 18 U.S.C. § 3626(b), a section of the PLRA that allows a court to terminate prospective injunctive relief governing prison conditions on a showing that the injunction is no longer needed to correct a current and ongoing violation of a Federal right.

B. Equal protection and ADA violations.

Plaintiffs in *Pierce* assert an equal protection claim under § 1983 based on the denial of equal treatment to disabled detainees, and they advance a separate claim for violations of Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131 *et seq.* Plaintiffs maintain that the County has violated the ADA by failing to address numerous structural barriers, such as inaccessible bathroom facilities,[4] and failing to provide adequate access to various programs offered by the County's jails.

One of the plaintiff inmates, Timothy Conn, claimed to have suffered physical injuries, as well as mental and emotional harms, because of the County's failure to accommodate his disability. Conn is wheelchair-bound and alleged that he suffered recurrent bladder infections because the County failed to provide him with an adequate supply of catheters. Conn also claimed to have developed bed sores that were

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[4] The particular architectural features at issue are discussed in greater detail *infra* Section V.D.3.a.

exacerbated when he was forced to sit on a holding cell bench, and eventually required surgery. The district court dismissed Conn's claims on summary judgment prior to trial on the grounds that they were "de minimis" and thus not actionable pursuant to the PLRA. *See* 42 U.S.C. § 1997e(e).

II. PROCEDURAL HISTORY

A. Class certification.

In August 2003, plaintiffs filed a motion for class certification under Federal Rules of Civil Procedure 23(b)(2) and 23(b)(3)[5] of a "main class" of pre-trial detainees who had been held in Orange County jails after October 21, 2001 and had experienced violations of certain rights enumerated in *Stewart,* as well as certification of a "sub-class" of disabled detainees who

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[5] According to Federal Rule of Civil Procedure 23(b)(2), a class action may be maintained when the prerequisites under subsection (a) of the rule are satisfied (i.e., numerosity, commonality, typicality, and representativeness), and "the party opposing the class has acted or refused to act on grounds that generally apply to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed.R.Civ.P. 23(b)(2).

If subsection (a) is satisfied, Federal Rule of Civil Procedure 23(b)(3) provides that a class action may be maintained where "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b)(3).

had been denied rights under the ADA. Plaintiffs' motion was granted on October 15, 2003.

In January 2004, Orange County filed a motion to decertify the class. The district court ruled on the motion on March 1, 2004, holding that certification as an "equitable relief class" remained proper under Rule 23(b)(2), but that certification as a "damages class" under Rule 23(b)(3) was inappropriate. Specifically, the court rejected plaintiffs' proposed proof of "aggregated damages" by relying on "statistical sampling to determine the proper amount of damages." Plaintiffs' counsel subsequently waived nominal damages on behalf of the named plaintiffs. It was agreed at a status conference on March 5, 2004, that the case would proceed to a bench trial as an equitable relief class without claims for damages.

In November 2004, the district court clarified the scope of class membership based on ADA violations. The court ruled that "ADA disability evidence [would] be limited to conditions applicable to Plaintiff Conn [a wheelchair-bound named plaintiff] and persons having a disability similar to his."[6]

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[6] Conn is described in the record as a paraplegic or incomplete quadriplegic, meaning that he has no mobility in his lower body and some, albeit limited, use of his upper body. The parties agree that the subclass consists of mobility- and dexterity-impaired inmates.

B. Summary judgment on claims for mental and emotional injury.

The district court's March 1, 2004 decertification order separately granted summary judgment to Orange County on plaintiffs' claims for mental and emotional injuries. The district court concluded that the PLRA, 42 U.S.C. § 1997e(e), bars plaintiffs' recovery for mental or emotional injury unless there is a showing of non-de minimis physical injury. The court found that plaintiffs' claims of relevant physical injuries were all de minimis, except for one incident involving plaintiff Conn not at issue here.[7]

C. Consolidation of *Pierce* with review of the *Stewart* orders.

On March 11, 2004, the district court *sua sponte* ordered that *Pierce,* the plaintiffs' affirmative suit, be consolidated with *Stewart,* over which the same district court had jurisdiction. According to the district court, the issue of the continuing viability of the *Stewart* injunction had come up indirectly "in various different ways" in the *Pierce* litigation, and the court concluded that "rather than beat around the bush, [the court] need[ed] to just deal with these issues direct[ly]." The court explained that it would "receive

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[7] The court held that Conn could recover for mental and emotional damages arising directly from this incident – a van accident. This one claim was bifurcated and ultimately settled in 2005.

evidence whether existing *Stewart* orders should be revised, updated, modified, expanded, and/or vacated" at the trial already scheduled in *Pierce*. The parties did not object to the consolidation, and proceeded to brief the court on the relevant developments in the law in the years since *Stewart* was first decided.

D. Summary judgment on equal protection claims.

On November 2, 2004, the district court granted Orange County's motion for summary judgment on plaintiffs' equal protection claim in *Pierce*. The court reasoned that disabled detainees were required to show that they were treated differently than other similarly situated prisoners, and had not satisfied the summary judgment standard for doing so. In the same order, the district court also held that plaintiffs' requests in *Pierce* for injunctive relief for non-ADA-related claims (to redress issues of mealtimes; holding cell conditions; and access to religious services, the day room, and exercise) were moot, in light of the then-existing injunctions in *Stewart*. In short, the court ruled that the question of injunctive relief for the non-ADA claims in *Pierce* would be addressed under the consolidated *Stewart* caption. The court held that declaratory relief remained available.

E. Evidentiary and trial management rulings.

At a pre-trial conference in early November 2004, the district court announced that each side would be allowed three days to present its case. Plaintiffs filed a written objection to the time limit on due process grounds. The objection was overruled, and a six-day bench trial was held, with each side receiving equal time. At trial, the district court adhered to its prior order on time limitations, advising counsel when time was running short.

The district court also ruled against the plaintiffs and in the County's favor on a number of evidentiary issues. First, the district court barred the admission of a survey of inmates regarding jail conditions conducted by plaintiffs' expert, Dr. Nadereh Pourat ("Pourat Survey"). Second, the district court ruled that plaintiffs could not submit deposition testimony of class members who were in prisons more than 100 miles from the courthouse, on the grounds that such witnesses were not "unavailable." Third, the district court allowed the County to introduce statements by absent class members as admissions by party-opponents.

* * *

Trial was held during the first week of December, 2004. On April 27, 2005, the district court issued two final orders – an "Order Vacating Earlier Orders and Dismissing Case in *Stewart*" ("*Stewart* Final Order"), and "Findings of Fact and Conclusions of Law in

Pierce" ("*Pierce* Final Order"). The *Stewart* Final Order vacated all of the injunctive orders in *Stewart* after finding that each was either "inappropriate" or "unnecessary." The *Pierce* Final Order also rejected in their entirety plaintiffs' § 1983 claims based on prison conditions and practices, either on the ground that the County had not violated a Federal right, or that there was no evidence of a policy or custom of violations. The court also held that the County was not liable for violations of the ADA.

III. JURISDICTION

The district court had jurisdiction over plaintiffs' claims under 28 U.S.C. § 1331 and § 1343. 28 U.S.C. § 1367 conferred jurisdiction over state claims. We have subject matter jurisdiction pursuant to 28 U.S.C. § 1291.

IV. TRIAL MANAGEMENT AND EVIDENTIARY RULINGS

Plaintiffs appeal a number of the district court's pre-trial rulings related to case management and the admission of evidence. We affirm each of the district court's rulings on these issues.

A. The district court did not abuse its discretion by limiting the trial to six days or by de-certifying the "damages class."

Plaintiffs argue that their due process rights were violated when they were given only three days to present their consolidated case in *Pierce* and *Stewart*. Plaintiffs in *Pierce* also contend that the court erred when it decertified their so-called "damages class." We review both decisions for abuse of discretion. *See Navellier v. Sletten*, 262 F.3d 923, 941 (9th Cir. 2001) (challenges to trial court management and denial of class certification reviewed for abuse of discretion).

First, although plaintiffs assert generally that they did not have adequate time to address the factual issues in *Pierce* and *Stewart*, we conclude that they have not shown that "there was harm incurred as a result" of the time limit. *Monotype Corp. v. Int'l Typeface Corp.*, 43 F.3d 443, 451 (9th Cir. 1994). Plaintiffs objected to the time limitation but did not specify what evidence they would have presented if more time had been allotted, nor did they request additional time. *See id.* (rejecting the plaintiff's argument after noting similar circumstances). Although the case was factually complex the district court did not abuse its discretion by limiting time for trial to three days per side.

Second, the district court did not abuse its discretion in decertifying the "damages class." The court

reasoned that Rule 23(b)(3) would not offer a superior method for fair and efficient adjudication in light of expected difficulties identifying class members and determining appropriate damages. It explained: "Class membership here would be highly fluid and indefinite. Issues of damages proof would be highly individualized and poorly addressed through a sampling. There are too many damages variables."

Plaintiffs counter that the district court ignored viable ways of assessing the damages for the *Pierce* class (estimated to be some 180,000 pre-trial detainees), and – as a result – harbored undue concerns about managing the class. Plaintiffs suggest that damages could be calculated by relying on records maintained by the County. Yet, they concede that such records are incomplete, and – in fact – at various points in the trial, they objected to reliance on the County's records on the ground that they were inconsistent or unreliable. Plaintiffs propose, alternatively, that statistical sampling could have been used to ascertain the aggregate amount of damages suffered by the class. The district court acknowledged that statistical sampling may be an appropriate tool for computing damages in some cases, but rejected that approach here. We conclude that the district court's decision was not an abuse of discretion given the facts of this case – in particular, the size of the class and

the array of variables related to causation and damages. *See* Fed.R.Civ.P. 23(b)(3)(D).[8]

B. The district court's exclusion of plaintiffs' proposed evidence was either not an abuse of discretion, or it did not prejudice plaintiffs.

Plaintiffs contend that three of the court's evidentiary rulings are erroneous. First, plaintiffs challenge the district court's decision to bar admission of the survey conducted by plaintiffs' expert, Dr. Pourat. Second, plaintiffs charge that the district court abused its discretion in ruling that plaintiffs could not submit deposition testimony of class members who were in prisons more than 100 miles from the courthouse. Third, plaintiffs contend that the district court committed reversible error when it allowed the County to introduce statements by absent class members.

We review *de novo* the district court's construction or interpretation of the Federal Rules of Evidence, including whether particular evidence falls within the scope of a given rule. *United States v. Durham,* 464 F.3d 976, 981 (9th Cir. 2006). The

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[8] Plaintiffs' briefs suggest that they seek only nominal damages on behalf of the class and therefore do not present issues of individual damages. The remainder of plaintiffs' argument belies this assertion, however, as the "aggregated damages" they describe are compensatory – not nominal.

district court's ultimate evidentiary ruling to admit or exclude the evidence is, however, reviewed for abuse of discretion. *See id.*; *City of Long Beach v. Standard Oil Co.,* 46 F.3d 929, 936 (9th Cir. 1995). A district court's decision will constitute an abuse of discretion if it makes an error of law or a clear error of fact, but "[r]eversal will not be granted unless prejudice is shown." *City of Long Beach,* 46 F.3d at 936. If the trial court has erred, we must begin with a presumption of prejudice, although the "presumption can be rebutted by a showing that it is more probable than not that the jury would have reached the same verdict even if the evidence had been admitted." *Obrey v. Johnson,* 400 F.3d 691, 701 (9th Cir. 2005).

1. *Plaintiffs' survey evidence.*

Plaintiffs hired Pourat, a senior research scientist at UCLA, to conduct a survey of County inmates. Pourat designed a survey questionnaire and trained law students and legal assistants to administer the questionnaire to detainees. Ultimately, 440 detainees were surveyed about their experiences in the County jails, providing the basis for Pourat's analysis. Without explaining its rationale, the district court refused to admit the study as direct evidence, but allowed plaintiffs' two expert witnesses – Dr. Patrick McManimon and Peter Robinson – to rely on the study in their testimony.

On appeal, the County defends the exclusion of the Pourat survey on the grounds that it did not meet

the standards of Fed.R.Evid. 807, the residual exception to the hearsay rule that we have in the past relied on to admit survey evidence, *Prudential Ins. Co. v. Gibraltar Fin. Corp.*, 694 F.2d 1150, 1156 (9th Cir. 1983), and because it contends the survey evidence was not "trustworthy." *Schering Corp. v. Pfizer, Inc.*, 189 F.3d 218, 231 (2d Cir. 1999) (noting that trustworthiness is a requirement for the admission of survey evidence).

We do not need to consider the County's justification of the district court's exclusion of this evidence, however, because we are persuaded that the exclusion of the survey as direct evidence did not prejudice plaintiffs in this case. Plaintiffs' experts were permitted to rely upon the Pourat Survey in formulating their opinions, and to share the data upon which they relied. McManimon described how the survey was conducted and noted its results – for example, that 35% of the detainees surveyed reported that they were given less than fifteen minutes per meal on at least one occasion, and that 67% of that group (in other words, approximately 23% of the surveyed population) reported that this occurred on at least a weekly basis.

2. *Deposition testimony of class members.*

Relying on Federal Rule of Evidence 804(a)(5) regarding the unavailability of witnesses, plaintiffs assert that the district court abused its discretion

when it ruled that they could not submit deposition testimony of class members who were incarcerated in prisons more than one hundred miles from the courthouse. "Unavailability" may be found when the declarant "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means." Fed.R.Evid. 804(a)(5). The district court judge refused to admit the proposed testimony under Rule 804 because he concluded that the plaintiffs had not made an adequate attempt to procure the witnesses' attendance. He noted that the parties had been warned about the "necessary administrative steps" to subpoena the prisoners, and found that plaintiffs had waited too long to seek the subpoenas. On appeal, plaintiffs do not contest this factual finding, and we therefore conclude that the district court judge's determination was not an abuse of discretion.

3. Statements of absent class members as "admissions of a party-opponent."

Plaintiffs contend that the district court erred by admitting the statements of absent – also referred to as unnamed or nonnamed-class members as "admissions of a party-opponent" under Federal Rule of Evidence 801(d)(2)(A). Following the court's ruling, the County introduced statements by twenty-four absent members of the class of pre-trial detainees. Plaintiffs were then allowed to counter-designate

testimony by those detainees under Federal Rule of Evidence 106, the general rule of completeness.

For an absent member of a Rule 23(b)(2) class to be treated as a party – and, hence, as a party representative of the class as a whole – for Rule 801 purposes there must be some mechanism to ensure that he or she will represent the interests of the class. *See* Fed.R.Civ.P. 23(a)(4) (requiring that "the representative parties will fairly and adequately protect the interests of the class"); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000) (holding, in relevant part, that the named plaintiffs must "prosecute the action vigorously on behalf of the class" to satisfy the requirement of adequate representation); Restatement (Second) of Judgments § 41(1)(e), cmt. a (1980) (describing the "party" in a class action as one who must "protect [] the interests" of the unnamed class members).

On July 1, 2004, plaintiffs disclosed the identities of forty-five inmates they expected to have testify regarding prison conditions. At least eighteen of the twenty-four statements that the County sought to introduce under Rule 801(d)(2) were taken from detainees on that list. We are satisfied that, on the facts of this case, reliance on statements by detainees who had been disclosed by plaintiffs' counsel as potential witnesses adequately protected the class from the risk of having the class's interests undermined by unrepresentative class members. The

district court did not abuse its discretion by admitting those statements.[9]

The remaining statements admitted by the court, and now challenged by the plaintiffs, were not disclosed to plaintiffs. We need not decide whether the statements of these detainees should have been excluded under Rule 801, as we conclude, upon review of the record as a whole (and in particular the other eighteen admitted statements), that the admission of those five statements was not prejudicial. *See Sablan v. Dep't of Fin. of Com. of N. Mariana Islands,* 856 F.2d 1317, 1323 (9th Cir.1988).

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[9] Although we conclude that the district court did not abuse it discretion, in so doing we do not adopt a blanket rule of admissibility for the statements of absent class members pursuant to Fed.R.Evid. 801(d)(2)(A). Absent class members are considered "parties for some purposes and not for others." *Devlin v. Scardelletti,* 536 U.S. 1, 10, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002). Here, we are satisfied that there were adequate strictures in place – conditioning the County's ability to obtain absent class member statements on notice to plaintiffs' counsel, disclosure of the nature of the suit, and plaintiffs' counsel's presence when the statements were taken – to ensure that the requirements of Fed.R.Evid. 801 were met, while still respecting the limitations on absent class member discovery inherent in Fed.R.Civ.P. 23.

C. The district court did not abuse its discretion by terminating the *Stewart* orders absent an explicit motion by the *Pierce* defendants.

Plaintiffs contend that the district court did not have the authority to vacate the *Stewart* injunction because the defendant failed to make the necessary motion. Plaintiffs further argue that they were not given adequate notice of the district court's intent to consider vacating all of the injunctive orders in effect under *Stewart* (including orders pertaining to issues that had not been raised in *Pierce*), and that this was a denial of due process. A district court generally has "broad" discretion to consolidate actions; we review its decision on consolidation under an abuse of discretion standard. *Investor's Research Co. v. U.S. Dist. Court for Cent. Dist. of Cal.*, 877 F.2d 777, 777 (9th Cir. 1989) ("broad discretion" to consolidate actions pending in the same district); *Washington v. Daley*, 173 F.3d 1158, 1169 n. 13 (9th Cir. 1999) (court's decision on consolidation reviewed for abuse of discretion).

The PLRA "establishes standards for the entry and termination of prospective relief in civil actions challenging prison conditions." *Miller v. French*, 530 U.S. 327, 331, 120 S.Ct. 2246, 147 L.Ed.2d 326 (2000). The PLRA both limits the prospective relief a court may order in such suits, and authorizes the termination of relief that does not fall within those limits. 18 U.S.C. § 3626(a)-(b). Section 3626(b)(1)(A) of Title 18 provides:

> In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or intervener . . . (iii) in the case of an order issued on or before the date of enactment of the Prison Litigation Reform Act, 2 years after such date of enactment.

Id. § 3626(b)(1)(A). The *Stewart* orders long pre-dated the PLRA's enactment, and more than two years had passed after the enactment when this suit commenced. As such, the relief was "terminable upon the motion of any party or intervener," provided that the orders were not found to fall within the limitation set out in 18 U.S.C. § 3626(b)(3).[10] More generally, under Federal Rule of Civil Procedure 60(b), a district court may "take cognizance of changed circumstances and relieve a party from a continuing decree." *Gilmore v. California,* 220 F.3d 987, 1007 (9th Cir. 2000). The text of Rule 60(b) provides that this may happen "[o]n motion and just terms." Fed.R.Civ.P. 60(b). In March 2004, approximately eight months before trial, the district court consolidated *Stewart* and *Pierce,* citing

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[10] As discussed further *infra*, 18 U.S.C. § 3626(b)(3) states:

> [p]rospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

the fact that questions of the continuing legitimacy of the injunctive orders in *Stewart* had been raised in various motions in *Pierce*. *See* Fed.R.Civ.P. 42 (giving the district court authority to consolidate matters involving common questions of law or fact).[11] The court provided the parties with notice that it would review the status of the existing *Stewart* orders and ordered related briefing. The plaintiffs did not object, and filed a brief addressing the legal bases for all of the *Stewart* orders.

Prior to the district court's decision to vacate the *Stewart* orders, the County made two written requests for termination or modification – first, in its pre-trial brief, and then in its closing brief after trial. While only the latter was styled a motion, the former formally requested that "the *Stewart* orders either be vacated or modified."

Plaintiffs have not challenged the district court's authority to consolidate *Pierce* and *Stewart* or, as the monitoring court, to review the status of the *Stewart* orders. Nor do the plaintiffs suggest any way in which, if accorded earlier notice, they would have handled matters differently. Plaintiffs were provided with adequate notice, and so we hold that the district court had authority to review and, if otherwise appropriate under § 3626, to modify or to terminate the

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[11] Plaintiffs acknowledged at a March 5, 2004 status conference that the County had raised questions about the enforceability of the orders in *Stewart*.

Stewart orders. *See* 18 U.S.C. § 3626(b); *Miller,* 530 U.S. at 353, 120 S.Ct. 2246 (Breyer, J., dissenting) (observing that the district court may modify or terminate relief).[12]

V. MERITS RULINGS

We turn next to the district court's merits rulings challenged on appeal. First, we consider order by order whether termination of the prospective relief ordered in *Stewart* was proper. Second, we consider the *Pierce* plaintiffs appeal of the district court's conclusion that the mealtimes; holding cell conditions; and access to religious services, the day room, and exercise provided by the County did not violate plaintiffs' rights under 42 U.S.C. § 1983.[13] Third, we

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[12] In its final disposition the district court, in some instances, referred to having "vacate[d]" the *Stewart* orders. In other instances, tracking the language of the PLRA more closely, it said that the orders were "unnecessary" and "terminable." *See* § 3626(b) (orders shall not "terminate" absent findings that prospective relief remains "necessary"). We read the district court's *Stewart* Final Order as merely terminating prospective relief, not vacating the *Stewart* judgment in its entirety. *See Inmates of Suffolk County Jail v. Rouse,* 129 F.3d 649, 662 (1st Cir. 1997) (PLRA only provides for termination of prospective relief, not vacatur of judgments).

[13] The district court considered only whether plaintiffs' Rule 23(b)(2) equitable relief class was entitled to declaratory relief for these claims. The court ruled that plaintiffs' request for injunctive relief under § 1983 was moot. The district court repeatedly acknowledged its authority under § 3626 to modify (and thereby expand or diminish) the existing *Stewart* injunction as it pertained to the same topics – mealtimes; holding cell

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address plaintiffs' challenge to the district court's finding of no actionable violations under § 1983 or state law. Finally, we review the district court's findings with respect to the § 1983 claims of physically disabled detainees raised under the ADA and the equal protection clause.

A. Standards for termination of prospective relief under the PLRA.

Under the PLRA, the *Stewart* injunctive orders should not have been terminated if, on the record presented, they satisfied the requirements of 18 U.S.C. § 3626(b)(3). The Act provides that relief shall not terminate if it "remains necessary to correct a current and ongoing violation of [a] Federal right, extends no further than necessary to correct the violation of the Federal right, and . . . is narrowly drawn and the least intrusive means to correct the violation." 18 U.S.C. § 3626(b)(3).[14] Review of an

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conditions; and access to religious services, the day room, and exercise – as required by the evidence presented. In light of this, we agree that the court's dismissal of plaintiffs' additional and separate request for injunctive relief in the same Orange County jails with regard to the same conditions was not in error.

[14] The district court's final order in *Stewart* suggests that the fact that a particular right has been well-established may militate against a finding that prospective relief remains necessary and appropriate. This view is unsupported by § 3626(b)(3). The question, in such a case, is simply whether there is a current and ongoing violation of the right, and whether the relief is properly tailored to correct the violation as required by the statute.

injunction pursuant to the PLRA's standards is thus sometimes referred to as a "need-narrowness-intrusiveness" inquiry. *Handberry v. Thompson,* 436 F.3d 52, 64 (2d Cir. 2006).

This standard requires an assessment of the circumstances – both legal and factual – at the time termination is sought. *See Gilmore,* 220 F.3d at 1010 (citing *Benjamin v. Jacobson,* 172 F.3d 144, 166 (2d Cir. 1999)). As state pre-trial detainees, plaintiffs are protected by the Fourteenth Amendment's Due Process Clause, as well as specific substantive guarantees of the federal Constitution, such as the First and Eighth Amendments. Under the Due Process Clause, detainees have a right against jail conditions or restrictions that "amount to punishment." *Bell v. Wolfish,* 441 U.S. 520, 535-37, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). This standard differs significantly from the standard relevant to convicted prisoners, who may be subject to punishment so long as it does not violate the Eighth Amendment's bar against cruel and unusual punishment. *Id.* at 535 n. 16, 99 S.Ct. 1861.

Absent evidence of express punitive intent, it may be possible to infer a given restriction's punitive status "from the nature of the restriction." *Valdez v. Rosenbaum,* 302 F.3d 1039, 1045 (9th Cir. 2002); *see Demery v. Arpaio,* 378 F.3d 1020, 1030 (9th Cir. 2004) (noting that "to constitute punishment, the harm or disability caused by the government's action must either significantly exceed, or be independent of, the inherent discomforts of confinement"). As the

Supreme Court has explained, the determination of whether a particular condition or restriction imposes punishment in the constitutional sense will generally turn on whether an alternate purpose is reasonably assignable:

> if a particular condition or restriction of pre-trial detention is reasonably related to a legitimate governmental objective, it does not without more, amount to "punishment." Conversely, if a restriction or condition is not reasonably related to a legitimate goal – if it is arbitrary or purposeless – a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.

Bell, 441 U.S. at 539, 99 S.Ct. 1861 (alterations in original) (quoting *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168-69, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963)); *see id.* at 539 n. 21, 99 S.Ct. 1861 (noting that a de minimis level of imposition is permissible). Legitimate nonpunitive governmental objectives include "maintaining security and order" and "operating the [detention facility] in a manageable fashion." *Id.* at 540 n. 23, 99 S.Ct. 1861.

The Due Process Clause also protects detainees' state-created liberty interests. *See Kentucky Dep't of Corr. v. Thompson,* 490 U.S. 454, 462, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989). For a state statute or regulation to create a liberty interest protected by the Constitution, two things must be true:

> [f]irst, the law must set forth "'substantive predicates' to govern official decision making" and, second, it must contain "explicitly mandatory language," i.e., a specific directive to the decision-maker that mandates a particular outcome if the substantive predicates have been met.

Valdez, 302 F.3d at 1044 (quoting *Thompson,* 490 U.S. at 462-63, 109 S.Ct. 1904).[15]

Finally, pre-trial detainees retain other specific constitutional guarantees. *See Bell,* 441 U.S. at 545, 99 S.Ct. 1861. As with the Fourteenth Amendment's substantive due process analysis, however, the detainees' rights may be subject to restrictions and limitations based on legitimate government concerns: "when an institutional restriction infringes a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security." *Id.* at 547, 99 S.Ct. 1861.

Assuming the prospective relief at issue is found to be necessary to correct a current and ongoing constitutional violation, we must consider whether § 3626(b)(3)'s need-narrowness-intrusiveness criteria are met. A determination of whether the relief goes

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[15] This test – used in *Thompson,* 490 U.S. at 462-63, 109 S.Ct. 1904, and *Hewitt v. Helms,* 459 U.S. 460, 471-72, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983) – remains the proper standard in the context of pre-trial detainees. *Valdez,* 302 F.3d at 1044 n. 3.

"no further than necessary to correct the violation" and is "narrowly drawn and the least intrusive means to correct the violation" will obviously rest upon case-specific factors-namely, the extent of the current and ongoing constitutional violations. *See, e.g., Morales Feliciano v. Rullan,* 378 F.3d 42, 54-55 (1st Cir. 2004); *see also Armstrong v. Davis,* 275 F.3d 849, 870 (9th Cir. 2001) (*"Armstrong '01"*) (noting, for example, that a "few isolated violations affecting a narrow range of plaintiffs" would not provide a basis for system-wide relief).

The parties operated under the agreement that the burden of proof to terminate the *Stewart* orders pursuant to § 3626 was on the County. We proceed under this assumption, without so holding, because the assignment of the burden of proof is not dispositive of any issue raised by the parties.[16]

B. The district court properly terminated eleven of the fourteen *Stewart* Orders under review.

For nine of the *Stewart* orders, the County's showing of compliance was not contested. We briefly discuss these in subsection V.B.1, below, and affirm the district court's termination of these orders. *Gilmore,* 220 F.3d at 1008. We address two additional

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[16] We note that there may be some tension in our case law in this area. *Compare Mayweathers v. Newland,* 258 F.3d 930 (9th Cir. 2001) *with Gilmore,* 220 F.3d at 1008.

Stewart orders (related to seating in holding cells and adequate meal times) for which the parties *did* present conflicting evidence, in subsection V.B.2. Because our review of these two orders overlaps considerably with our review of the claims brought by the plaintiffs in *Pierce* under 42 U.S.C. § 1983 and California state law, we address plaintiffs' claims as part of our review of the termination of the orders themselves.

1. *Termination of Stewart Orders related to reading materials, mattresses and beds, law books, population caps, sleep, blankets, telephone access, and communication with jailhouse lawyers.*

The district court found that the *Stewart* order regarding the availability of reading materials by mail, as well as the order regarding the availability of mattresses and beds, properly sought to enforce detainees' federal rights. The district court also acknowledged that the *Stewart* order regarding law-book access merely required that the County's policy be applied to each of its jail facilities. The district court went on to conclude, however, that these orders were not needed to correct current and ongoing violations. We agree. The County presented evidence tending to show its compliance with these *Stewart* orders,[17] and the plaintiffs did not present

[17] Testimony and documentary evidence showed that deputies and other officials or employees of the Sheriff's department

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any contrary evidence related to these orders to contest the County's showing.

The district court also acknowledged that population caps may be an appropriate remedy when overcrowding rises to the level of constitutional violation, but found no ongoing violation here. On the record presented we agree.

Finally, the district court terminated the *Stewart* orders pertaining to sleeptimes, blanket use, telephone access, communications with "jailhouse lawyers," and visitation for inmates in administrative segregation. In light of the County's presentation of evidence and the plaintiffs' failure to contest the County's showing, we affirm the district court on the ground that these orders are not necessary to correct current and ongoing violations. We therefore do not reach the question of whether these orders extend no further than necessary and are narrowly drawn and the least intrusive means to correct the violation. *See* § 3626(b)(3).

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received substantial training regarding the *Stewart* orders, and that department policies had been modified to reflect the requirements set out in *Stewart*. In addition, laminated reference cards were distributed to jail employees, to be carried in their uniforms, as reminders of the *Stewart* orders. Sheriff's department employees testified, with specificity, to their roles in ensuring compliance with the *Stewart* orders.

2. *Termination of Stewart Orders related to seating and meal times.*

a. Seating/holding cells.

The *Stewart* order requires that inmates be provided with seating while detained in holding cells, or elsewhere, awaiting transport to or from court. We affirm the district court's termination of the order, as we conclude that the evidence presented does not suggest that the continuation of prospective relief was necessary to correct a current and ongoing constitutional violation.

The record shows that the County actively seeks to avoid overcrowding of holding cells; maximum capacities are posted in the cells, and deputies monitor the cells to ensure compliance. Deputies testified that, on occasion, overcrowding of a particular holding cell may be necessary for logistical and security reasons, but – as the district court found – these instances occur infrequently. Moreover, the record here shows that the hardship associated with the County's occasional overcrowding of the holding cells does not rise to the level of constitutional violation, given the relatively short periods (i.e., matters of hours) detainees spend in the holding cells. There is no evidence of unsanitary conditions or other concerns that would elevate such overcrowding to a constitutional violation. *See, e.g., Bell,* 441 U.S. at 542, 99 S.Ct. 1861; *Lareau v. Manson,* 651 F.2d 96, 103 (2d Cir. 1981). For these reasons, we also affirm the district court's conclusion that plaintiffs failed to establish that the treatment of detainees in the

County's holding cells constituted a violation of 42 U.S.C. § 1983.

b. Time for meals.

The *Stewart* order requires that inmates be given "not less than fifteen minutes within which to complete each meal." The district court terminated this *Stewart* order and rejected plaintiffs' § 1983 claim that they had been denied adequate meal times in violation of a federally protected right.

Turning to plaintiffs' § 1983 claim, we conclude that they have not established that the mealtimes allowed by the County amounted to punishment in the constitutional sense and thus a deprivation of substantive due process. The only potential ground for constitutional relief suggested by the record would be a liberty interest created by a state regulation, in this case Cal. Code. Regs. Tit. 15, § 1240. *See Kentucky Dep't of Corr. v. Thompson,* 490 U.S. 454, 462, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989). However, the plaintiffs have not appealed the district court's pretrial ruling that this was not adequately pled as a basis for § 1983 relief.

Finally, plaintiffs brought a state law claim for relief based on California Code of Regulations § 1240. Even assuming, without deciding, that § 1240 is sufficient to create an actionable duty under California law, *see* Cal. Govt. Code § 815.6; *Haggis v. City of Los Angeles,* 22 Cal.4th 490, 498-99, 93 Cal.Rptr.2d 327, 993 P.2d 983 (2000) (to be actionable under

§ 815.6, the enactment at issue must: (1) be obligatory, rather than discretionary or permissive; (2) must require that a particular action be taken or not taken, and (3) require that the mandatory duty be designed to prevent the kind of injury suffered by the plaintiff), in light of the policies and procedures implemented by the County to facilitate compliance with the *Stewart* order, we affirm the district court's conclusion that the County exercised reasonable diligence.[18]

C. The district court erred by terminating two *Stewart* orders mandating minimal access to religious services and exercise for inmates housed in administrative segregation.

Three of the remaining fourteen *Stewart* orders under review concern conditions for inmates in administrative segregation. As mentioned above, *see* n. 3, *supra*, administrative segregation is a classification for inmates with violent tendencies that have been deemed a threat to the jail's staff or to other inmates. The *Stewart* orders provide that inmates classified as administrative segregation must nonetheless be provided with limited access to religious services, limited access to exercise, and limited access to use of a day room. The district court terminated all three *Stewart* orders ensuring such access, and likewise

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[18] We offer no view whether the parties may pursue state remedies in state court for violations of the state constitution, statutes or mandatory regulations.

found that plaintiffs had not proved any actionable § 1983 claim based on a deprivation of those rights. As explained below, we conclude that the district court's finding that inmates in administrative segregation were only "sporadically" denied access to religious services is clearly erroneous. The denials were systematic, and sufficiently so to constitute a violation of § 1983. Likewise, the record also demonstrates that detainees in administrative segregation were not provided with even the two hours per week of exercise required under the *Stewart* order. We are satisfied that providing inmates only ninety minutes of exercise per week – less than thirteen minutes per day – does not comport with constitutional standards, and that such a severe curtailment of the detainees' ability to exercise evidences its punitive intent and necessitates reinstatement of the *Stewart* order.

1. *Termination of Stewart order related to religious worship.*

The *Stewart* order requires that inmates in administrative segregation be allowed one of the following opportunities for religious worship: attending regularly scheduled religious services once a week, making short individual visits to the chapel once each week, or meeting with a bona fide religious adviser upon request of the inmate or adviser. The order also provides for the curtailment or elimination of the right if, in the course of exercising it, the inmate is disruptive or violent.

Under the Constitution, "reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments." *Cruz v. Beto,* 405 U.S. 319, 322 n. 2, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972) (addressing the rights of convicted prisoners). However, as with other First Amendment rights in the inmate context, detainees' rights may be limited or retracted if required to "maintain [] institutional security and preserv[e] internal order and discipline." *Bell,* 441 U.S. at 549, 99 S.Ct. 1861; *see, e.g., Freeman v. Arpaio,* 125 F.3d 732, 737 (9th Cir. 1997). Restrictions on access to "religious opportunities" – whether group services, chapel visits, or meetings with religious advisers – must be found reasonable in light of four factors: (1) whether there is a "valid, rational connection" between the regulation and a legitimate government interest put forward to justify it; (2) "whether there are alternative means of exercising the right that remain open to prison inmates"; (3) whether accommodation of the asserted constitutional right would have a significant impact on guards and other inmates; and (4) whether ready alternatives are absent (bearing on the reasonableness of the regulation). *Turner v. Safley,* 482 U.S. 78, 89-90, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987); *see also Beard v. Banks,* 548 U.S. 521, 126 S.Ct. 2572, 165 L.Ed.2d 697 (2006); *Mauro v. Arpaio,* 188 F.3d 1054, 1058-59 (9th Cir. 1999) (en banc). Further, because we are dealing with pre-trial detainees, to satisfy substantive due process requirements the restriction or

regulation cannot be intended to serve a punitive interest. *Bell,* 441 U.S. at 535, 99 S.Ct. 1861.[19]

As the district court observed, under this standard some courts have allowed restrictions on worship for security purposes. *Pedraza v. Meyer,* 919 F.2d 317, 320 (5th Cir. 1990) (restriction on type of service inmate may attend permissible where inmate still provided with reasonable opportunities to worship). Denying inmates access to *all* outlets for religious worship, however, offers no "alternative means of exercising the right," as called for by the second prong of *Turner. Cf. O'Lone v. Estate of Shabazz,* 482 U.S. 342, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987) (concluding that prison rules which prohibited Muslim inmates from engaging in Friday afternoon prayer services were reasonable, and relying in part on the fact that the inmates were allowed to participate in other weekly religious services and to have "free access" to the prison's imam).

Accordingly, a detainee's placement in administrative segregation does not, standing alone, justify a complete denial of opportunities to practice religion. *See Alston v. DeBruyn,* 13 F.3d 1036, 1040 (7th

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[19] The Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc *et seq.*, requires the government to meet a higher burden of proof than the rational basis standard of *Turner. See Greene v. Solano County Jail,* 513 F.3d 982 (9th Cir. 2008). Because the plaintiffs have not brought a RLUIPA claim, we apply only the constitutional analysis and the *Turner* standard.

Cir. 1994) (holding that it was improper for the district court to assume that limits on an inmate's access to religious services were justified based on the inmate's placement in administrative segregation); *Mawhinney v. Henderson,* 542 F.2d 1, 3 (2d Cir. 1976) (holding that inmates in "punitive segregation and keeplock" could not be denied participation in chapel services simply on the basis of their classification; individualized determinations of the "necessity of their exclusion" were required).

The district court's final order in *Stewart* states that there was "no indication of punishment" or "any ongoing violation" of detainees' rights with respect to access to religious services. Although the court's final order in *Pierce* acknowledges evidence of at least "[o]ccasional instances of impediments to participation," the court characterized these denials as merely "sporadic." But the record evidences consistent denial of access to the chapel (whether for group services or individual visits) and to religious advisers to those in administrative segregation.

Both of the plaintiffs' witnesses that were housed in administrative segregation, Fermin Valenzuela and Keith Hawkins, testified that they were routinely denied access to any kind of religious worship. Valenzuela testified that none of his requests to meet with his chaplain were granted, and testified that the verbal explanation he received for the denial was that inmates "in administrative segregation . . . don't have it coming." Likewise, Hawkins testified that when he was classified in administrative segregation between

March 2003 and June 2003, he was "never" allowed to attend chapel. Even the County's own witness, Deputy Brian Nissen, testified that he had "never seen one of our Ad Seg inmates" in chapel.

The County's evidence was not to the contrary. Although the County argues on appeal that testimony from three detainee plaintiffs (detainees Conn, Palmitessa and Robledo) supported its contention that it provided "regular access to religious services and clergy at every opportunity," the record does not bear out the County's characterization. Conn – who was not an administrative segregation inmate – merely testified that he was permitted to attend chapel and that no Deputy ever told him that administrative segregation inmates had limited access to religious services. We are not persuaded that an inmate's failure to obtain a voluntary admission of non-compliance from his jailer somehow constitutes proof of compliance. Similarly, Palmitessa – also not an administrative segregation detainee – testified that he went to chapel whenever it was offered, but that it had not, in fact, been offered to him for several weeks. Finally, Robledo – another non-administrative segregation witness – testified on cross-examination that she was allowed access to religious services, but as she made clear on re-direct, she had "difficulties" getting access to chapel.[20]

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[20] Although the County offers the testimony of these three non-administrative segregation detainees to support affirmance,

(Continued on following page)

Nor did the County's affirmative evidence support the district court's factual finding that the County provides "opportunities for inmates to participate in religious services and counseling," at least not as to administrative segregation detainees. The County relied primarily on the testimony of two jail personnel – Sergeant Dubsky and Deputy McCulloch – to support its contention that inmates were provided "regular access to religious services and clergy at every opportunity." Sergeant Dubsky testified that administrative segregation detainees must fill out a message slip to obtain access to a chaplain, and that there is no limitation on the number of visits available. But Sergeant Dubsky did not testify that administrative segregation detainees were actually given such access. Likewise, Deputy McCulloch merely testified as to the manner in which chapel is called for non-administrative segregation detainees. He did

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it simultaneously chastises the plaintiffs for referring to the testimony of several other non-administrative segregation detainees who testified that they had great difficulty in gaining any access to religious services. For example, Detainee Ronald Rogers testified that he had "never in over two-and-a-half years been offered religious services." Detainee James Sukanich testified that when housed in the main jail he had not been given access to any religious services for seven months. Detainee Edward Swanstrom testified that he received "no response" to his multiple requests for access to religious services. Although the district court's finding of "sporadic" denials is erroneous without consideration of this additional testimony, it nonetheless undermines the County's claim that inmates, in any population, received regular access to religious services.

not establish that chapel was called weekly, bi-weekly or with any other pattern of regularity.

A custom can be shown or a policy can be inferred from widespread practices or "evidence of repeated constitutional violations for which the errant municipal officers were not discharged or reprimanded." *Gillette v. Delmore,* 979 F.2d 1342, 1349 (9th Cir. 1992); *see also Nadell v. Las Vegas Metro. Police Dep't,* 268 F.3d 924, 929 (9th Cir. 2001). Plaintiffs' counsel asked the Sheriffs' department officials who testified whether deputies were ever disciplined or reprimanded for *Stewart* violations. No witness was able to identify any instance in which disciplinary steps were taken or a reprimand was issued.

Moreover, the County's witnesses did not contend, and its brief on appeal does not suggest, that detainees in administrative segregation are denied worship opportunities because of security concerns, or for other legitimate non-punitive reasons. The district court should not have blindly deferred to the County's bare invocation of security concerns, when the County has failed to even establish that there is regular access to religious services for administrative segregation detainees, much less that interruptions in such access are on account of security. *Walker v. Sumner,* 917 F.2d 382, 386 (9th Cir. 1990) ("Without requiring some evidence that prison policies are based on legitimate penological justifications . . . 'judicial review of prison policies would not be meaningful.'") (citation omitted). In sum, the district court

erred in denying declaratory or injunctive relief under § 1983.

Similarly, the *Stewart* order remains necessary to ensure that detainees in administrative segregation are not denied access based on their classification alone. We therefore reverse the judgment of the district court with regard to this component of the *Stewart* injunction, as the record demonstrates that its enforcement "remains necessary to correct a current and ongoing violation of [a] Federal right." 18 U.S.C. § 3626(b)(3). We also conclude that the *Stewart* order, as presently constituted, extends no further than is necessary and is the least intrusive means to correct the violation. *Id.* The terms of the *Stewart* injunction require that detainees in administrative segregation be afforded opportunities for worship, provided the detainees have not become disruptive or violent, implicating legitimate security concerns, even though the injunction does not require that detainees be afforded access to group religious services. The jail may instead satisfy the order by allowing individual chapel visits or meetings with religious advisers. In sum, the order – with its provision for the curtailment or elimination of detainees' rights based on security concerns – provides for no more than a minimum level of ongoing participation in religious activities. Accordingly, we conclude that the injunction is narrowly drawn and extends no further than necessary to correct the violation of a Federal right. 18 U.S.C. § 3626(b)(3).

2. *Termination of Stewart order related to regular exercise.*

Exercise is one of the basic human necessities protected by the Eighth Amendment. *See LeMaire v. Maass,* 12 F.3d 1444, 1457 (9th Cir. 1993) (as amended). Moreover, the Fourteenth Amendment requires that pre-trial detainees not be denied adequate opportunities for exercise without legitimate governmental objective. *See Bell,* 441 U.S. at 538, 99 S.Ct. 1861. Determining what constitutes adequate exercise requires consideration of "the physical characteristics of the cell and jail and the average length of stay of the inmates." *Housley v. Dodson,* 41 F.3d 597, 599 (10th Cir. 1994). In the Orange County jails, the average period of pre-trial detention is 110 days, with those accused of being "third strike" offenders spending an average of 312 days. Even by conservative estimates, detainees in administrative segregation and protective custody[21] spend twenty-two hours or more in their cells each day.

As the district court noted, other courts have held that detainees who are held for more than a short time and spend the bulk of their time inside their cells are ordinarily entitled to daily exercise, or five to seven hours of exercise per week, outside their cells. *See Campbell v. Cauthron,* 623 F.2d 503, 507 (8th Cir. 1980) (holding that pre-trial detainees are generally entitled to one hour of exercise outside their cells

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[21] *See* n. 3, *supra.*

daily if they spend more than sixteen hours in their cells); *see also Housley,* 41 F.3d at 599 ("'a failure to provide inmates (confined for more than a very short period . . .) with the opportunity for at least five hours a week of exercise outside the cell raises serious constitutional questions'") (quoting *Davenport v. DeRobertis,* 844 F.2d 1310, 1315 (7th Cir. 1988)). And at least one district court, in a class action brought pursuant to § 1983 challenging pre-trial conditions of confinement, has held that "defendants' failure to provide each inmate one hour per day of exercise outside the cells is a constitutionally intolerable condition." *Hutchings v. Corum,* 501 F.Supp. 1276, 1294 (D. Neb. 1980).

The record shows that pre-trial detainees in administrative segregation and other restrictive classifications, such as protective custody, are typically afforded, at best, only ninety minutes weekly in a space equipped for exercise.[22] Although we need not hold that there is a specific minimum amount of weekly exercise that must be afforded to detainees

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[22] The County contends that, contrary to the testimony of several inmates, detainees may also exercise in the day rooms. The County concedes, however, that day rooms are not designed for exercise and that detainees may not use any of the room's fixtures (such as bars, chairs, tables, or wall hooks) for exercise purposes. While inmates' access to day rooms, discussed further *infra,* is a factor affecting our determination of what constitutes adequate exercise, it does not – given the space constraints and absence of any appropriate equipment – constitute an exercise opportunity.

who spend the bulk of their time inside their cells, we hold that providing the equivalent of slightly less than thirteen minutes of exercise a day does not give meaningful protection to this basic human necessity. *See LeMaire,* 12 F.3d at 1457; *Housley,* 41 F.3d at 599. We therefore conclude that plaintiffs have established a violation of § 1983.

In finding no punitive intent, the district court relied exclusively on the fact that "a group of detainees congregating in an open area containing weights and other equipment raises security concerns." We agree that the County has considerable discretion to curtail access to exercise based on security concerns. *Bell,* 441 U.S. at 539 n. 23, 99 S.Ct. 1861. Here, however, the curtailment to ninety minutes weekly for inmates who otherwise spend the bulk of their time inside their cells reduces the amount of exercise to a point at which there is no meaningful vindication of the constitutional right to exercise for this entire category of detainees. The County has provided nothing more to justify this almost complete denial of exercise than a generalized reference to institutional security concerns. It has made no showing that such a severe restriction is reasonably related to satisfying those concerns. *Compare Spain v. Procunier,* 600 F.2d 189, 192, 199-200 (9th Cir. 1979) (impermissible to completely deny access to outdoor exercise for a particular category of inmates, even when inmates within that category were being disciplined for committing violent acts while in prison) *with LeMaire,* 12 F.3d at 1458 (upholding denial of exercise privileges

for a particular inmate deemed a "grave security risk" who had previously attacked corrections officers). Given the severity of the current restrictions and their application across an entire category of detainees, we conclude that ninety minutes of exercise per week constitutes punishment for purposes of § 1983.

Accordingly, we also determine that the *Stewart* order, which requires that inmates in administrative segregation be permitted exercise at least twice each week for a total of not less than 2 hours per week, is "necessary to correct a current and ongoing violation of [a] Federal right." 18 U.S.C. § 3626(b)(3). We likewise conclude that the *Stewart* order, as it is currently constituted, is "narrowly drawn and is the least intrusive means to correct the violation." *Id.* The *Stewart* order requires considerably *less* exercise – just two hours a week – than the one hour a day recognized elsewhere as a constitutional floor. More importantly, the *Stewart* order contains a safety-valve that permits the County, in its discretion, to "curtail or eliminate" exercise rights "in the event such inmate becomes violent or disruptive in the course of exercising such rights." Thus, the existing *Stewart* order accords the County sufficient deference in determining whether a particular inmate poses a risk to security requiring limitations on or revocation of the right. On remand, the district court must reinstate the *Stewart* order and enjoin violation under § 1983.

3. *Termination of Stewart order related to access to day room.*

The *Stewart* order requires that inmates be given access to the day room for two hours daily, but provides for curtailment or elimination of the right to day room access for security or disciplinary reasons. Confinement necessarily imposes restraints on detainees' freedom of movement and access to recreation. Nonetheless, such restrictions may "constitute punishment in the constitutional sense," and thus violate the Fourteenth Amendment, if they are not "rationally related to a legitimate nonpunitive governmental purpose and . . . appear excessive in relation to that purpose." *Bell,* 441 U.S. at 561, 99 S.Ct. 1861. Given the conditions and average duration of confinement in administrative segregation and similarly restrictive classifications, failure to provide detainees with the opportunity for some daily out-of-cell movement raises serious constitutional questions. *See Bell,* 441 U.S. at 543, 99 S.Ct. 1861 (considering day room access as a factor that mitigates overcrowding); *Lock v. Jenkins,* 641 F.2d 488, 493-94 (7th Cir. 1981) (finding that the importance of day room access increases as the length of time the detainee spends in the cell increases and the size of the cell decreases).

The record evidence demonstrated that administrative segregation detainees, were, in fact, given access to the day room. The restrictions placed on use of the day room – limiting administrative segregation detainees' use of the room to one or two inmates at a

time – are reasonably related to institutional security concerns. For these reasons, we affirm the district court's denial of plaintiffs' claim under 42 U.S.C. § 1983, because in this instance the County's restrictions still permit access to the day rooms and do not evince any punitive intent. Accordingly, there is no evidence of a "current and ongoing violation of a Federal right," and we therefore also affirm the district court's termination of this *Stewart* order. 18 U.S.C. § 3626(b)(3).[23]

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[23] Plaintiffs advance two related claims based on state law. First, plaintiffs argue that § 1053 of Title 15 of the California Code of Regulation creates a general mandatory duty actionable under § 815.6 of the California Government Code. We disagree. Because of the high degree of discretion left to officials under § 1053, we do not agree that § 1053 satisfies the standard articulated in *Haggis*, 22 Cal.4th at 498, 93 Cal.Rptr.2d 327, 993 P.2d 983. Second, plaintiffs maintain that § 1065 of Title 15 creates a duty actionable under § 815.6. During the relevant time period, § 1065 instructed the jails' facility administrators to develop written policies and procedures to provide a minimum of three hours of exercise or recreation per week. Even assuming § 1065 satisfies California's three-pronged test, *see Haggis*, 22 Cal.4th at 498, 93 Cal.Rptr.2d 327, 993 P.2d 983, the evidence does not show a lack of reasonable diligence in providing the detainee population three hours of exercise or day room recreation per week. We affirm the district court's denial of these state law claims.

D. The district court erred by finding that the County was not in violation of the ADA.

Having addressed the portions of this appeal relating to the *Stewart* injunction and the claims of the overall *Pierce* class, we turn our attention to the rights of the *Pierce* sub-class of mobility- and dexterity-impaired pre-trial detainees.

Plaintiffs argued at trial that the County was not in compliance with the ADA or California's co-extensive access requirements at § 54.1 of the California Civil Code. Plaintiffs maintained that the County failed to address numerous structural barriers and, as a result, denied mobility- and dexterity-impaired detainees access to various features and elements of their cells and common spaces. They also argued that, because of their disabilities, they were segregated and denied access to a variety of the County's educational, rehabilitative, and recreation programs, services, and activities for pre-trial detainees. Despite finding that the County was not "in full ADA compliance," the district court "decline[d] to declare an ADA or California Civil Code violation, or order injunctive relief." This decision cannot stand. As we explain below, we reverse in part and remand for further proceedings consistent with this opinion.

1. *Standards for evaluation of the ADA claims.*

Pursuant to Title II of the ADA, a "qualified individual with a disability" cannot, "by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.[24] It is undisputed that Title II applies to the Orange County jails' services, programs, and activities for detainees. *See Pa. Dep't of Corr. v. Yeskey,* 524 U.S. 206, 209-10, 118 S.Ct. 1952, 141 L.Ed.2d 215 (1998); *Lee v. City of Los Angeles,* 250 F.3d 668, 691 (9th Cir. 2001). The regulations promulgated under Title II spell out the obligations of public entities.[25] Under the

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[24] The ADA's definition of "public entity" includes "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1); *Lee v. City of Los Angeles,* 250 F.3d 668, 691 (9th Cir. 2001).

> The ADA defines a "qualified individual with a disability" to include anyone with a disability "who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2).

[25] Congress authorized the Attorney General to promulgate regulations under the ADA. 42 U.S.C. § 12134(a). The regulations are therefore given "legislative and hence controlling weight unless they are arbitrary, capricious, or plainly contrary

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regulations, a qualified individual with a disability (an individual for whom reasonable modifications may be required, 42 U.S.C. § 12131(2)) must not be excluded from or denied the benefits of a public entity's services, programs, or activities because the entity's facilities are inaccessible or unusable. *See* 28 C.F.R. § 35.149.

Generally, public entities must "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." *Id.* § 35.130(b)(7); *see McGary v. City of Portland,* 386 F.3d 1259, 1265-67 (9th Cir. 2004).

In a subsection titled "existing facilities," the regulations provide that a public entity must "operate each service, program, and activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a). The regulations, however, note in relevant part that: (1) a public entity is not necessarily required "to make each of its existing facilities accessible to and usable by individuals with disabilities," *id.* § 35.150(a)(1); and (2) a public entity is not required "to take any action that it can

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to the statute." *United States v. Morton,* 467 U.S. 822, 834, 104 S.Ct. 2769, 81 L.Ed.2d 680 (1984).

demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens," *id.* § 35.150(a)(3).[26]

The regulations allow public entities to use a variety of methods to make existing facilities "readily accessible," including the "reassignment of services to accessible buildings" and the "alteration of existing facilities and construction of new facilities." *Id.* § 35.150(b)(1). Section 35.150(b)(1) provides:

> A public entity is not required to make structural changes in existing facilities where other methods are effective in achieving

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[26] Section 35.150(a)(3) further explains:

> In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with § 35.150(a) of this part would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of a public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.

> compliance with this section. . . . In choosing among available methods for meeting the requirements of this section, a public entity shall give priority to those methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting appropriate.

Id.; *see also* 28 C.F.R. Pt. 35, App. A (stating that under Title II "the concept of program access will continue to apply with respect to facilities now in existence, because the cost of retrofitting existing facilities is often prohibitive").

To the extent that structural changes are to be made to an existing facility, the accessibility requirements that apply to new construction and alterations, set out in 28 C.F.R. § 35.151, must be met. 28 C.F.R. § 35.150(b)(1). In addition, the regulations require that an entity with more than fifty employees, such as Orange County, develop a "transition plan" setting forth the steps that must be taken to complete any planned structural changes. *Id.* § 35.150(d)(1). Finally, January 26, 1995, was the deadline for making structural changes under the regulations. *Id.* § 35.150(c).

While § 35.150 addresses itself to "existing facilities," § 35.151 concerns "new construction and alterations." The regulatory requirements in this section are somewhat more straightforward. *See Parker v. Universidad de Puerto Rico,* 225 F.3d 1, 6 & n. 7 (1st Cir. 2000) (comparing Title II's regulations governing "existing facilities" and "new construction

and alterations"). Section 35.151 requires that any part of a public entity's facility constructed after January 26, 1992 must be designed and constructed "in conformance with the Uniform Federal Accessibility Standards ('UFAS') (41 C.F.R. Pt. 101-19.6, App. A) or with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities ('ADAAG') (28 C.F.R. Pt. 36, App. A)." *Id.* § 35.151(a), (c) (allowing departures from these standards when it is "clearly evident that equivalent access" is afforded). And, to the maximum extent possible, any part of a public entity's facility altered after January 26, 1992 "in a manner that affects or could affect [its] usability" must also be altered in conformance with one of these accessibility standards. *Id.* § 35.151(b), (c).

2. *ADA standards in the context of prison administration.*

While the regulations promulgated under Title II provide a framework for analyzing ADA claims generally, we have held that inmates' rights must be analyzed "in light of effective prison administration." *Gates v. Rowland,* 39 F.3d 1439, 1446 (9th Cir. 1994). As the district court observed, we held in *Gates,* 39 F.3d at 1447, that inmates' claims that their rights under the Rehabilitation Act had been violated were subject to the so-called "reasonable relation" standard

articulated in *Turner*. 482 U.S. at 89, 107 S.Ct. 2254.[27] Under *Turner*, a regulation that would impinge on inmates' constitutional rights is nevertheless valid if it is reasonably related to the prison's legitimate interests.[28] *Id.* We concluded in *Gates* that to prevail on a claim that their statutory rights have been violated, inmates must show that the challenged

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[27] Title II of the ADA was expressly modeled after § 504 of the Rehabilitation Act of 1973, Pub.L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of Title 29 of the United States Code), and essentially extends coverage to state and local government entities that do not receive federal funds. *Compare* 29 U.S.C. § 794(a) *with* 42 U.S.C. §§ 12131, 12132. We have therefore observed that "[t]here is no significant difference in analysis of the rights and obligations created by the ADA and the Rehabilitation Act." *Zukle v. Regents of Univ. of California*, 166 F.3d 1041, 1045 n. 11 (9th Cir. 1999); *see Armstrong v. Wilson*, 124 F.3d 1019, 1023 (9th Cir. 1997) (noting that "Congress has directed that the ADA and RA be construed consistently") (citing 42 U.S.C. § 12134(b)).

[28] *Turner* identified four factors relevant in determining the reasonableness of prison policies, discussed briefly *supra* Section V.C.1. The first of these – whether there is a "'valid, rational connection' between the prison policy and the legitimate governmental interest put forward to justify it[,]" 482 U.S. at 89, 107 S.Ct. 2254 (quoting *Block v. Rutherford*, 468 U.S. 576, 586, 104 S.Ct. 3227, 82 L.Ed.2d 438 (1984)) – "constitutes a *sine qua non*." *Walker v. Sumner*, 917 F.2d 382, 385 (9th Cir. 1990); *see Ashker v. California Dep't of Corr.*, 350 F.3d 917, 922 (9th Cir. 2003) (same); *see also Beard*, 126 S.Ct. at 2577-79 (considering all factors but noting "we believe that the first rationale itself satisfies *Turner*'s requirements").

prison policy or regulation is unreasonable. *Gates,* 39 F.3d at 1447.[29]

In ADA cases, the plaintiff bears the burden of establishing the elements of the prima facie case, including – if needed – "the existence of a reasonable accommodation" that would enable him to participate in the program, service, or activity at issue. *Zukle,* 166 F.3d at 1046. The public entity may then rebut this by showing that the requested accommodation would require a fundamental alteration or would produce an undue burden. *See* 28 C.F.R. § 35.150(a)(3). As we explained in *Zukle,* determining whether a modification or accommodation is reasonable always requires a fact-specific, context-specific inquiry. 166 F.3d at 1048. This analysis permits a court to consider, with deference to the expert views of facility administrators, a detention or correctional facility's legitimate interests (namely, in "maintaining security

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[29] Plaintiffs argue that Supreme Court cases since *Gates* have effectively overruled the approach taken in that case. They note that the Supreme Court, in holding that Title II applies to state prisons, reasoned that "[t]he text of the ADA provides no basis for distinguishing these programs, services, and activities from those provided by public entities that are not prisons." *Yeskey,* 524 U.S. at 210, 118 S.Ct. 1952. Plaintiffs also note that in *Johnson v. California,* 543 U.S. 499, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005), the Supreme Court refused to analyze inmates' claim of racial discrimination under *Turner,* opting instead for a strict scrutiny analysis. The appeal before us today, however, does not require a reexamination of *Gates,* because reversal is warranted on this record even when measured against the deferential "reasonable relation" standard.

and order" and "operating [an] institution in a manageable fashion," *Bell,* 441 U.S. at 540 n. 23, 99 S.Ct. 1861) when determining whether a given accommodation is reasonable. *Cf. Crawford v. Indiana Dep't of Corr.,* 115 F.3d 481, 487 (7th Cir. 1997).

3. *The County has failed to reasonably accommodate mobility-impaired and dexterity-impaired inmates in violation of the ADA.*

The plaintiff class of mobility- and dexterity-impaired pre-trial detainees contends that the County's failure to accommodate their disabilities has prevented them from enjoying a number of the County's services, programs, and activities. They argue that the County has not reasonably addressed various structural barriers, and maintains unreasonable policies and practices in violation of the ADA.

a. Physical barriers.

With regard to barriers, the district court found the evidence to show that "the Orange County jails have not yet been brought into full ADA compliance. In 2000, Orange County adopted a Transition Plan to move existing facilities toward ADA compliance. That plan was directed more toward structural modifications of public and visitor areas than toward compliance in inmate areas." The district court went on to state that "inmate witnesses and plaintiff's expert, Mr. Robertson, identified various specific

architectural barriers and features that are out of compliance with the ADA."

These findings are clearly supported by the record. As of 2004, when the case went to trial, the County housed mobility- and dexterity-impaired pretrial detainees in two of its five facilities – the Men's and Women's Central Jails. Male inmates with such disabilities were placed in one of three parts of Module O in the Men's Jail: Sheltered Living, Ward C, or Ward D. Female inmates with such disabilities were housed in either Sheltered Living in Module P of the Women's Jail or the infirmary. Plaintiffs' expert witness Peter Robertson was permitted to tour these areas, and to take photographs and measurements of the structures and fixtures. He testified at length regarding his measurements, observations, and conclusions. Robertson maintained that a host of features and fixtures – including toilets, sinks, showers, hot water dispensers, telephones, and water fountains – in cells or common spaces the County referred to as "accessible" did not comply with federal accessibility standards.[30] Since the district court's

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[30] Our references to "accessibility" – like those made by the district court and the parties – are to be construed in terms of the impairments of the sub-class of mobility- and dexterity-impaired detainees. Issues of accessibility for those with other impairments – such as loss of hearing or sight – are not before us.

> Robertson examined housing cells which the County asserted were intended to accommodate individuals with mobility and dexterity disabilities. There was
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order fails to specify which "architectural barriers and features [were] out of compliance with the ADA," we limit ourselves to noting – in support of the court's proper, but vague, finding – that a number of the deficiencies reported by Robertson were conceded by Ron Bihner, the project manager charged with supervising structural modifications at the County jails pursuant to the Transition Plan, and many others were not explicitly disputed. Notably, Bihner agreed that the showers in Wards C and D were not accessible to the mobility-impaired, conceded that the toilet and sink in the women's infirmary day room were inaccessible to individuals in wheelchairs, and acknowledged that the rooftop exercise and recreation areas afforded to male and female disabled detainees did not offer accessible bathroom facilities.[31] The County presented no evidence to dispute Robertson's assertions that rooftop telephones and water fountains were inaccessible to those in wheelchairs and

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one such cell in Men's Sheltered Living (an area dedicated to housing disabled detainees, which consists of eighteen cells, each housing two to four inmates), three such cells in Women's Sheltered Living, and one such cell in the Women's Infirmary. Men's Wards C and D are open dormitory-style medical wards and do not consist of discrete cells. Robertson also examined day rooms and other common spaces intended for use by those with mobility and dexterity impairments.

[31] In the men's rooftop area, for example, the bathroom facilities can only be reached via a narrow doorway and stairs. The County's Transition Plan did not include any plans to modify any elements or features of the men's or women's rooftop recreation areas.

that the sinks and toilets serving the Women's Central Jail classroom were inaccessible, as well as facilities in other areas.[32]

While it is evident that the district court was well-supported by the record when it observed (albeit without specificity) that the "existence of barriers" had been shown, the district court inexplicably made further findings which are unsupported by and contrary to the record: The court concluded that the plaintiffs were not entitled to relief because they had not shown that "effective modifications could be made," or that "where an architectural shortcoming existed, it was not made accessible by other appropriate action taken by a jail employee." The district court asserted broadly that where structural corrections had not been made, the County had shown that "other effective remedies [were] in use."

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[32] As we discuss further *infra*, the County asserted that it did not house mobility- and dexterity-impaired detainees in its other jail facilities – Theo Lacy, James A. Musick, and the Intake Release Center ("IRC"). The County acknowledged, however, that disabled detainees are kept in the IRC's holding cells and booking cells. Because the County did not permit Robertson to tour those areas, the only related evidence came from the statement of a Sheriff's Department official, Lieutenant Rick Edgmon. Edgmon claimed that two cells in the booking loop (one female and one male) had been partially modified. At that time of this statement in July 2003, he noted that accessible sinks had not yet been installed. Neither he nor other witnesses stated whether, or to what extent, any cells in the "release section" of the IRC had been modified, as called for by the Transition Plan.

To begin, we agree that plaintiffs were required to show "'the existence of . . . reasonable accommodation[s]'" that would enable them to make use of the facilities. *Zukle,* 166 F.3d at 1046 (quoting *Barnett v. U.S. Air, Inc.*, 157 F.3d 744, 749 (9th Cir. 1998)). Any finding that they did not do so is legal error. Robertson's testimony included site-specific suggestions of structural, as well as non-structural, accommodations. He drew upon the minimum standards set out in the UFAS or the ADAAG for proposed structural changes, such as the repositioning of a sink or the replacement of controls. *See* 28 C.F.R. § 35.150(b)(1) (requiring that structural modifications be made in accord with the guidelines for new construction, UFAS or ADAAG). Alternative solutions to remedy some access problems were also offered. For example, Robertson noted in one instance that an inaccessible water fountain could be remedied by adding a cup dispenser rather than changing the position of the fountain.

The district court found further that the County was not required to remedy structural deficiencies because "other curative methods" provided disabled individuals with the requisite access. We agree, as a matter of law, that where reasonable alternative methods achieve compliance, structural changes to existing facilities need not be made. 28 C.F.R. § 35.150(b)(1). However, there is no support for the court's conclusion that such methods were shown to cure the many structural deficiencies in this case.

The only deficiencies that were shown to be addressed by alternate methods were small surface-elevation changes – i.e., ridges or curbs – that otherwise posed obstacles to movement between locations. Robertson observed, for example, that a five-inch curb obstructed access to the women's rooftop recreation area. He testified that this could be overcome by having a trained deputy guide a wheelchair over the curb. The record supports the conclusion that deputies, in fact, do this, and plaintiffs are not denied access to the rooftop or other locations because of these surface irregularities.[33]

The County did not present evidence, as the district court's broad finding asserts, that other deficiencies were remedied through the assistance of deputies or by "other curative methods." Plaintiffs, on the other hand, presented evidence to show that deficiencies were not remedied. Robertson testified, for example, that he observed detainees – not deputies – struggling to lift a fellow wheelchair-bound detainee over a foot-high retention wall in one of Ward C's inaccessible showers. Conn also testified that he was forced to rely on fellow inmates for

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[33] County policies require deputies to transport wheelchair-bound detainees between locations – that is, between their cells and other areas, such as the day room, rooftop, or chapel. (In other words, deputies push the wheelchairs, rather than allowing the detainees to propel themselves, as they do once they have arrived at a given location.)

assistance when faced with inaccessible bathroom facilities.[34]

The impediment posed by such a barrier highlights the inadequacy of deputy or other inmate assistance. The County maintained throughout the trial that the deputies have their hands full given the ratio of deputies to inmates and the various duties incumbent upon the former. Staffing limits make it unreasonable to expect to address all structural deficiencies through deputy assistance.

The County argues that the district court's holding should, in any event, be affirmed because plaintiffs failed to satisfy their burden under *Turner*. We disagree. Even under *Turner*, the County was required to proffer some reason for its policy or practice. *See Armstrong '01*, 275 F.3d at 874. The County did not posit any legitimate rationale for maintaining inaccessible bathrooms, sinks, showers, and other fixtures in the housing areas and commons spaces assigned to mobility- and dexterity impaired detainees.[35] The vague assertion by the County's counsel

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[34] While examining Robertson and Bihner, counsel for the County asked whether, in certain instances, assistance from deputies or other non-structural solutions might adequately accommodate individuals with disabilities. We pause to note the obvious – that such questions and answers may establish that a reasonable accommodation is possible, but do not show that it is practical or has been implemented.

[35] We note the one exception discussed *supra*. We agree that the County's policy with regard to small level changes – eschewing structural modification in favor of another reasonable

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that some accommodations might be costly cannot be construed as a legitimate basis for failing to comply with the ADA (whether through structural modifications or other reasonable methods). *See id.*; *Walker*, 917 F.2d at 386.

We conclude that the district court erred in denying relief because it based its conclusion on clearly erroneous factual findings. Accordingly, we remand for further proceedings.

b. Integration and access to programs and services.

Plaintiffs also argued that, by virtue of being housed exclusively in the Men's and Women's Central Jails, they were denied access to a variety of programs, activities, and services for which they would otherwise be eligible. Plaintiffs essentially advanced two arguments: First, they challenged the County's policy of segregating disabled detainees, rather than allowing them to reside, recreate, and consume meals in integrated settings. Second, they argued that, regardless of where they are housed, the County had not "operate[d] each service, program, or activity so that the service, program, or activity, when viewed in its entirety, [was] readily accessible to and usable by individuals with disabilities," as required by 28 C.F.R. § 35.150(a).

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method of achieving compliance – was not shown to be unreasonable.

The district court rejected plaintiffs' claims. First, the court concluded that the segregation of disabled detainees was reasonably related to legitimate interests, and therefore declined to order mainstreaming. Second, the court found that "the evidence shows that, except for the 'Best Choice' Program, the various inmate programs are also available to disabled inmates," and concluded that this was reasonable. The exclusion of disabled inmates from the Best Choice Program, a drug rehabilitation program, was deemed reasonable in light of security concerns.

We do not find error in the district court's ruling regarding mainstreaming. Sheriff's Department officials testified at some length regarding the security concerns related to housing mobility- and dexterity-impaired detainees with non-disabled detainees. The district court's finding that plaintiffs did not refute this evidence is not clearly erroneous.

The district court's finding that disabled inmates had access to all programs, save the Best Choice program, cannot, however, be squared with the record.[36] As we mentioned earlier, as of 2004, disabled detainees with mobility and dexterity impairments

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[36] The district court's decision speaks only of "inmate programs" and makes no mention of "services" or "activities" offered by the County jails. It is impossible to say whether the court considered the full breadth of plaintiffs' claims (which included services and activities). We assume, for purposes of our review, that the court intended to include, and thereby reject, plaintiffs' claim as it related to services and activities.

were not housed in the County's James A. Musick Facility or Theo Lacy Facility.[37] The testimony of Sheriff's Department officials revealed that Theo Lacy and Musick offered a variety of programs, services, and activities which were not available to inmates of the Men's and Women's Central Jails. For example, programs in agriculture, woodworking, and welding were among the vocational opportunities available at Musick or Theo Lacy, but not available at the Central Jail Complex. In addition, detainees at Musick and Theo Lacy were afforded opportunities to participate in off-site or community work projects. The recreational opportunities available at Musick or Theo Lacy – where inmates had access to a softball field, volleyball courts, pool tables, and other indoor and outdoor facilities – also exceeded those provided at the Central Jail Complex.

The Central Jail Complex houses both disabled and non-disabled detainees. However, non-disabled detainees retain at least the possibility of access to the programs offered at Musick and Theo Lacy, while disabled detainees – solely by virtue of their status as disabled – have no possibility of access to the superior services offered outside of the Central Jail Complex.

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[37] According to the County, Musick does not offer accessible in-custody facilities. (The Transition Plan only provided for modifications to Musick's public and visitor areas.) Theo Lacy, which houses male detainees, was substantially renovated in the late 1990s. County and Sheriff's Department officials asserted at trial that a new Sheltered Living module for men was built, but had not yet been staffed due to budgetary constraints.

The ADA does not require perfect parity among programs offered by various facilities that are operated by the same umbrella institution. But an inmate cannot be categorically excluded from a beneficial prison program based on his or her disability alone. *Yeskey,* 524 U.S. at 210, 118 S.Ct. 1952 ("Modern prisons provide inmates with many recreational 'activities,' medical 'services,' and educational and vocational 'programs,' all of which at least theoretically 'benefit' the prisoners (and any of which disabled prisoners could be 'excluded from participation in')."). Moreover, ADA regulations contemplate "reassignment of services to accessible buildings," as a permissible means of accommodation. 28 C.F.R. § 35.150(b)(1). The County would not have to make Musick and Theo Lacy physically or structurally ADA compliant. It might consider, for example, redistributing some programs available at those two facilities to make them available at the Central Jail so that when "viewed in [their] entirety" the County's programs are "readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a). But the County may not shunt the disabled into facilities where there is no possibility of access to those programs.[38]

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[38] There is no clear case authority on this precise point – whether the ADA permits an umbrella organization to exclude the disabled from particular facilities with superior programs and services, so long as there is one accessible facility with inferior programs. But at least one district court has noted, in the context of school programs, that there is a "discriminatory effect" when disabled students are discouraged from "attempting

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While the County need not make all of its existing facilities accessible to individuals with or without disabilities, it is expected to provide "program access." 28 C.F.R. Pt. 35, App. A. Any type of educational, vocational, rehabilitative, or recreational program, service, or activity offered to nondisabled detainees should, when viewed in its entirety, be similarly available to disabled detainees who, with or without reasonable accommodations, meet the essential eligibility requirements to participate. Whether this "program access" standard may reasonably be met or whether any restriction on access is reasonably related to a legitimate government objective is necessarily fact-specific. We also emphasize that the district court should look at the offerings as a whole and in their entirety and thus the court is not

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to participate in classes and other programs located in inaccessible facilities." *Putnam v. Oakland Unified School Dist.*, 1995 WL 973734 at *10, 15 A.D.D. 1361 (N.D.Cal. Jun.9, 1995). There are, of course, security concerns in a prison system that are not present in a high school system, but the concerns associated with inequalities between different facilities inhere in both scenarios. While a court should be "hesitant to second-guess" a "good faith accessibility plan," here there is no plan to make any of the services available at Musick and Theo Lacy accessible to disabled inmates housed at Central Jail. *Id.* Thus, while the County has considerable discretion under the regulations to determine whether and how it can extend program accessibility, it cannot simply do nothing. *Id.* ("For example, upon determining that none of its schools was accessible with respect to all necessary and unique facilities, the District might have decided to make some of its high school campuses partially accessible, in such a way as to make all the Districts' programs accessible at those campuses.").

required to ensure that each individual program or service offered at Theo Lacy and Musick is offered in complete parity with an offering at the Central Jail.

The County has offered no explanation or justification, either in district court or on appeal, for the significant differences between the vocational and recreational activities available at Theo Lacy and Musick, and those available to either able or disabled detainees at the Central Jail. As such, the County has not raised the defense that a policy of restricting access to these programs, services, or activities is reasonably related to a legitimate government objective. *See Armstrong '01,* 275 F.3d at 874. We conclude that the district court erred when it concluded that disabled inmates had access to "the various inmate programs," and we must remand as further fact-finding is required to determine what relief is appropriate.[39] In particular, the district court should examine the feasibility of offering similar programs at the Central Jail, and the extent to which the programs offered at Theo Lacy or Musick are capable of being offered at the Central Jail without eliminating those programs at Theo Lacy or Musick. There may be other appropriate remedies that provide disabled inmates access to programs and services, and the

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[39] We do not disturb the district court's ruling with regard to the Best Choice Program but do require the district court to determine whether and how security is a problem and to determine whether other programs at the Central Jail offer similar or essentially equivalent programs.

district court should consider those options as well. Our intention is not to suggest or cause the termination or diminution of programs or facilities other than the Central Jail, but to have the district court explore available options on a full evidentiary record.

c. The district court's unsupported assumption that the County would "move toward" full compliance was clearly erroneous.

The district court determined that the County was not in compliance with the ADA, but took it on faith that the County would "move toward full compliance." This conclusion is unwarranted given the County's track record. The County adopted its Transition Plan for structural changes in August 2000 – eight years after the deadline set by the regulations for such plans, and five and a half years after the regulations' deadline for the completion of structural modifications.[40] Furthermore, when ultimately adopted, the Plan failed to address many architectural barriers in common spaces used by disabled detainees (for example, those on the rooftop of the Men's and Women's Jails). Diane DeHaas, the Orange County ADA Title II Coordinator, testified that the work under the Transition Plan had been completed,

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[40] Further, Ron Bihner testified that the adoption of the Plan was not on the County's initiative but rather was prompted by a declaratory relief case brought in Orange County Superior Court, *Blaser v. Orange County*, No. 78892.

and spoke of no particular plans to remedy any of the glaring deficiencies.

The County has done even less to ensure that disabled detainees are given opportunities to benefit from the various programs, activities, and services offered by the jails. While Title II regulations require that the County complete a self-evaluation regarding the availability of programs, activities, and services, *see* 28 C.F.R § 35.105(a), DeHaas conceded that she did not know whether it had been done for the County jails. Moreover, she admitted that she had no information about whether disabled detainees could have access to educational programs or a variety of other services.

In any event, neither the fact that Orange County might move toward compliance nor the district court's belief that it would do so eventually constituted a proper basis for denying plaintiffs relief. We must remand so that the district court can engage in further fact-finding, consistent with our opinion, to determine what relief should be granted. We note that several years have passed since the trial was held, and, as a result, determining what prospective relief is warranted may require consideration of any significantly changed facts.[41]

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[41] Whether or not disabled detainees are now housed in Theo Lacy will obviously be pertinent to the district court's inquiry.

Finally, the district court's Final *Pierce* Order did not address plaintiffs' claims that they were denied adequate notice of their rights under the ADA and an appropriate grievance procedure, as required by the regulations. *See* 28 C.F.R. §§ 35.106, 35.107. On remand, the district court also should make findings on these issues.

d. Claims for mental and emotional harms.

Prior to trial the district court granted summary judgment to Orange County on plaintiffs' claims for mental and emotional harms. We conclude that decision was in error as it related to two specific allegations advanced by plaintiff Timothy Conn.

According to plaintiffs' complaint, Conn alleged that the County failed to adequately accommodate his disability in violation of the ADA, and that he suffered physical injuries, as well as mental and emotional distress, as a result. The district court's March 1, 2004 order held that these alleged injuries were merely de minimis, and therefore precluded by the PLRA, 42 U.S.C. § 1997e(e), from giving rise to any cognizable claim under the ADA for compensatory damages. The PLRA, 42 U.S.C. § 1997e(e), states, "No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." *See Oliver,* 289 F.3d at 626-27 (concluding that

§ 1997e(e) requires a "showing of physical injury that need not be significant but must be more than *de minimis.*").

Conn challenges the district court's determination, arguing that § 1997e(e) does not apply to claims under the ADA and that his injuries were in any case more than de minimis. While the former argument is unpersuasive in light of the plain language of § 1997e(e),[42] the latter argument compels our reversal of the district court's decision with regard to two of Conn's allegations.

Conn alleged that during his detention in 2000-2001 he was denied an adequate supply of catheters, and as a result suffered recurrent *bladder infections*. He also alleged that he was not provided a proper mattress given his disability, and as a result developed *bed sores*. Neither of these injuries is de minimis. Both *bladder infections* and *bed sores* pose significant pain and health risks to paraplegics like

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[42] Plaintiffs have offered no reasoned basis for carving out an exception for ADA claims. They point to our holding in *Armstrong v. Davis*, 318 F.3d 965 (9th Cir. 2003), that § 1997e(d)(3)'s cap on awards of attorneys fees authorized by 42 U.S.C. § 1988 does not apply to the successful litigation of ADA claims, and maintain that § 1997e(e) is analogous. Section 1997e(e), however, does not include language similar to that which is found in subsection (d)(3) constraining its application. Moreover, in *Armstrong* we explicitly declined to look to other provisions of the PLRA in interpreting § 1997e(d)(3). *Id.* at 974 n. 9; *see also Cassidy v. Indiana Dep't of Corr.*, 199 F.3d 374, 376 (7th Cir. 2000) (rejecting a similar argument).

Conn.[43] Our court has rejected as overly restrictive the standard for de minimis injuries espoused by the Northern District of Texas in *Luong v. Hatt,* 979 F.Supp. 481 (N.D. Tex., 1997), which requires "'an observable or diagnosable medical condition requiring treatment by a medical care professional,' which would cause a 'free world person' to seek such treatment." *Oliver,* 289 F.3d at 628. We have maintained that if allowing claims for de minimis injuries requires too little of plaintiffs, this standard requires too much. *Id.* Yet notably, Conn's alleged *bed sores* and *bladder infections* clear even that stringent standard. Both constitute "'observable or diagnosable medical conditions'" that would lead a person to seek treatment. *See id.*[44] In sum, these claims were

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[43] The physical injury requirement directs the court to consider the injury suffered by an individual and not the degree of force used by the state to inflict the injury. *See Oliver,* 289 F.3d at 628. Where, as here, the complainant is a paraplegic, particular injuries pose different, and possibly more substantial, risks than they might to an average prisoner.

[44] On appeal, the County urges us to affirm the district court on other grounds. The County argues that, even if Conn's alleged injuries were not de minimis, his claims would not have been actionable under the ADA. We disagree. Providing inmates with appropriate and adequate bedding and bathroom facilities are "services" of the jail. The fact that Conn's required "bathroom facilities" included catheters does not change the analysis. The jail was required to provide him with an adequate and appropriate means of relieving himself. There is still an issue as to whether he was provided adequate toilet facilities because the expert, Robertson, testified that the grab bar is still not properly positioned.

improperly dismissed, and we remand to the district court for further proceedings consistent with this opinion.

E. The district court did not err in rejecting plaintiffs' equal protection claims.

Finally, the disabled plaintiffs argue that the district court improperly rejected the equal protection claim brought by the sub-class of mobility- and dexterity-impaired detainees. After reviewing the district court's November 2004 ruling *de novo, see Buono v. Norton,* 371 F.3d 543, 545 (9th Cir. 2004), we affirm the grant of summary judgment.

The district court considered whether plaintiffs could establish that they were treated differently from how similarly situated prisoners are treated. This is the first step in a successful equal protection claim based on disability. *See McGowan v. Maryland,* 366 U.S. 420, 425, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961); *Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 490, 75 S.Ct. 461, 99 L.Ed. 563 (1955). "Because 'the disabled do not constitute a suspect class' for equal protection purposes, a governmental policy that purposefully treats the disabled differently from the non-disabled need only be 'rationally related to legitimate legislative goals' to pass constitutional muster." *Lee,* 250 F.3d at 687 (quoting *Does 1-5 v. Chandler,* 83 F.3d 1150, 1155 (9th Cir. 1996)). However, the court's assertion that "disabled and nondisabled detainees are not similarly situated for

equal-protection purposes" is an overstatement. Disabled and nondisabled detainees may be similarly situated in some instances. *See, e.g., More v. Farrier,* 984 F.2d 269, 270-71 (8th Cir. 1993) (finding that wheelchair-bound inmates and nondisabled inmates were equally capable of watching television without assistance, and therefore were similarly situated with regard to the installation of cable television); *see also City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 446, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.").

Nonetheless, we conclude that the district court's holding was proper, given the case presented by the plaintiffs. Plaintiffs' allegations in support of their equal protection claim did not show that they were treated differently from similarly situated prisoners. For example, although plaintiffs alleged that paraplegic and quadriplegic detainees were kept in holding cells without accessible toilets and sinks, they did not allege that the County accommodated the special needs of any other group with regard to toilet or sink access. While these allegations implicate the County's ADA obligations, they do not, without more, implicate equal protection concerns.

VI. CONCLUSION

We affirm all of the district court's pre-trial management and evidentiary rulings challenged on

appeal. We conclude that the district court did not abuse its discretion in consolidating the *Pierce* action with the *Stewart* decree proceeding. We further hold in respect to the trial that the district court did not violate the *Pierce* plaintiffs' due process rights by limiting the length of the trial, nor do we find reversible error in its evidentiary rulings.

As to the claim that the district court lacked authority on its own to terminate the orders in the *Stewart* decree, we conclude that the County, in effect, moved for the termination. The parties consented to the consolidation and briefed the issues relating to the continuing viability of orders in the *Stewart* decree. Accordingly, we hold that the district court had the requisite authority.

On the merits, of the fourteen *Stewart* orders under review, we concur in the termination of all but two of those orders, and grant plaintiffs corresponding injunctive relief under § 1983 related to those two orders. We grant relief under § 1983 for the violation of the rights of inmates held in administrative segregation to access to religious services and hold that they are entitled to injunctive relief. We hold further that the *Stewart* order on the provision of religious services may not be terminated. We grant relief under § 1983 to inmates in administrative segregation for violation of their right to constitutionally protected exercise and hold that they are entitled to injunctive relief. We hold further that the *Stewart* order requiring exercise for inmates in administrative segregation, subject to that order's safety-valve provision

permitting the County to curtail or eliminate exercise for inmates that become violent or disruptive, may not be terminated.

As to the claims of disabled inmates, although we hold there is no equal protection violation inherent in the disparate treatment of those detainees, we conclude that the County has violated the ADA. Accordingly, we grant relief to disabled prisoners on their ADA claims as follows: (a) The district court must conduct further fact finding on the current state of physical barriers to adequate access to bathrooms, showers, exercise areas, day rooms, dining rooms, cells and all other areas to which disabled persons should have access and order remedial remedies as required; (b) The district court must conduct further fact finding as to the programs and activities disabled persons currently have access to and order such remedial measures as required to make the County's provision of programs and services, when viewed in their entirety, accessible to mobility- and dexterity-impaired inmates.

Finally, we conclude that Conn suffered physical injuries that were not de minimis as a result of inadequacies in jail facilities. The district court thus erred in dismissing his claims of mental and emotional harms. We remand those claims for further proceedings.

AFFIRMED IN PART, REVERSED IN PART, REMANDED.

APPENDIX A (the *Stewart* Orders)

The following *Stewart* orders are at issue in this appeal:

Reading Materials Via Mail

> Inmates will be permitted to receive through the mail any newspapers, magazines or paperback books that may lawfully be transmitted through the United States Postal System, subject to reasonable withholding for contraband and security purposes. Inmates may receive hard cover books upon prior request and a showing of particularized need.

Mattresses and Beds

> Every prisoner kept overnight in the jail will be accorded a mattress and bed or bunk upon which to sleep. This Order shall not preclude defendants from permitting inmates to be housed with full bedding but without a bunk, for one night only if, in defendants' judgment, said inmate or inmates require more secure housing than is provided in the available areas and the appropriate housing does not have a sufficient number of bunks. This Order shall also not apply in the event of an emergency causing a sudden and unusual intake of prisoners, in which case full bedding shall be provided and defendants will exercise their best efforts to provide bunks for all inmates as soon as possible.

Law Books

> The rights of inmates to obtain law books [through the process established by jail authorities] shall apply to each facility of the jail.

Population Cap

> Beginning 10 days after filing of this Order, the Sheriff of Orange County will not receive an inmate in the Central Jail any person to whom he cannot (and does not) provide a bed within twenty-four hours after arrival. Beginning 10 days after filing of this Order, no more than 90 inmates shall be incarcerated in the 8 respective dormitories into which the 3-tier bunks have been installed. . . . [I]n the Main Men's Jail in Santa Ana, California, there will be a population capacity of 1296 inmates assigned to housing. Such housing shall be defined as only the third and fourth floor general population modules on the Main Men's Jail in Santa Ana, California.

Sleep

> The defendant jail authorities are ordered to accord to each inmate the opportunity for eight hours uninterrupted sleep on the night before and the night after each court appearance.

Blankets

Whenever inmates in their cells may properly be at ease on their beds, they will be permitted to cover themselves with blankets provided that sufficient anatomy is exposed to establish the presence of a person.

Telephone Access

The defendant jail authorities shall cause to be installed no fewer than sixteen telephones (in addition to those in operation on January 1978) in locations that the defendants shall determine to be most reasonably accessible to the inmates. These telephones, and all other telephones installed for inmates' use, shall be made available to the inmates for outgoing calls at reasonable times upon request, subject to priorities of emergency and rotation. Such telephone availability will be accorded inmates in administrative segregation and in medical isolation.

Interjail Communication with "Jailhouse Lawyers"

The Sheriff shall furnish envelopes for the purported valid purpose [of inmates' interjail communications with their fellow inmate "jailhouse lawyers"]; . . . may inspect the envelope and its contents; [and] shall promptly deliver the envelope to the addressee unless some sinister purpose is disclosed.

Seating/Holding Cells

The defendant jail authorities will provide a place, other than the floor, for each inmate to sit while being detained in a holding cell, or elsewhere, before leaving for court or following return from court.

Mealtime

The defendant jail authorities are ordered to allow inmates not less than fifteen minutes within which to complete each meal.

Administrative Segregation

Nothing in this paragraph shall interfere with the authority of the defendants to curtail or eliminate the rights herein accorded an inmate in administrative segregation in the event such inmate becomes violent or disruptive in the course of exercising such rights.

Inmates in administrative segregation will be permitted:

Religious Services

To attend regularly scheduled religious services of their own selection once each week or, alternatively, to make individual visits to the chapel once each week for not more than twenty minutes, or at defendants' option, . . . to meet with a bona fide minister, priest, rabbi, or other similar religious adviser at

any time upon request of either the inmate or the religious adviser.

Day room

Daily use of a day room for not less than 2 hours.

Exercise

Rooftop exercise and recreation at least twice each week for a total of not less than 2 hours per week.

Visitors

Will be permitted to receive visitors not less than twice each week. Such visits will take place at the regular visitors' facility or at such other place as the defendants shall determine.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

FRED PIERCE et al., Plaintiffs, vs. COUNTY OF ORANGE et al., Defendants.	Case No. SA CV 01-981-GLT (MLGx) FINDINGS OF FACT AND CONCLUSIONS OF LAW (Filed Apr. 27, 2005)

Plaintiffs sued for claimed unlawful conditions in the Orange County jails. The Court rules in favor of defendant County.

A. BACKGROUND

Plaintiffs Pierce, Ellerston, Valenzuela, and Conn bring class claims against Defendant County of Orange,[1] contending the County violates certain constitutionally protected and statutorily recognized standards in pre-trial inmate treatment at the Orange County jails. Plaintiffs also contend the County's jail conditions create unlawful barriers and lack of access to programs for disabled inmates.

[1] The other defendants have been dismissed from the case.

Plaintiffs seek various remedies for the claimed violations of their rights.[2]

The matter was tried without a jury over several days.[3] Extensive briefing was submitted before and after the trial. Pursuant to Rule 52(a), Federal Rules of Civil Procedure, the Court now makes its findings and conclusions.[4]

B. PRE-TRIAL INMATE CONDITIONS OF CONFINEMENT

Plaintiffs contend the County violates standards of pre-trial inmate treatment in several ways. It is claimed these violations are actionable as constitutional violations under 42 U.S.C. § 1983 (as *Monell* violations), and as state law violations under Title 15, California Code of Regulations.[5]

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[2] One inmate's separate personal injury claim was bifurcated and will be tried after this matter is concluded.

[3] This case was tried under a fixed time limit, with equal time allocated to each side. The Court finds the time allocated to each side was adequate to present their case. Each side had full opportunity to, and did, present their case completely and properly, and the positions of the respective parties were fully considered by the Court.

[4] For purposes of this ruling, the Court finds Plaintiffs have standing and their claims are not moot.

[5] Claims are treated as not separately actionable under the Court's orders in the *Stewart* case, but potentially actionable, instead, under 42 U.S.C. § 1983.

As the basis for the § 1983 claim, the Court has reviewed the evidence for indications of the Fourteenth Amendment's "purpose of punishment" standard set in *Bell v. Wolfish,* 441 U.S. 520, 538-39 (1979). The Court has also examined the evidence for indications of excessiveness in the County's conduct, *Demery v. Arpaio,* 378 F.3d 1020, 1028-29 (9th Cir. 2004), or deliberate indifference.

Since the County of Orange is the Defendant, for § 1983 liability Plaintiffs must show a constitutional violation due to a policy or custom of the County. *Monell v. Department of Social Services of the City of New York,* 436 U.S. 658, 694 (1978). Random acts or events are not a custom. *Thompson v. City of Los Angeles,* 885 F.2d 1439, 1443-44 (9th Cir. 1989). To be a custom, "the conduct [must have] become a traditional method of carrying out policy." *Trevino v. Gates,* 99 F.3d 911, 918 (9th Cir. 1996).

Although compliance with Title 15's requirements is mandatory for agencies like the County, *Inmates of Sybil Brand Institute for Women v. County of Los Angeles,* 130 Cal. App. 3d 89, 108 (1982), there is a substantial question whether Title 15 creates mandatory duties for purposes of civil liability. Assuming (but not deciding) the potential for civil liability exists, the Court has examined the evidence as to whether the conditions of confinement complained of are reasonably related to a legitimate governmental purpose, *Sybil Brand* at 101-02, and whether the County has exercised reasonable diligence, California Government Code § 815.6.

The claims on which the parties have joined issue are the following:[6]

1. Mealtime

Plaintiffs argue there are pervasive violations of sufficient time to eat meals, in violation of both § 1983 and Title 15.

For § 1983 purposes, there is no constitutional standard for time to be allocated for an inmate's meal. The Constitution is satisfied as long as detainees are served well-balanced meals, containing sufficient nutritional value to preserve health. *Green v. Ferrell,* 801 F.2d 765, 770 n.5 (5th Cir. 1986). Title 15 § 1240 sets a minimum fifteen minute meal time.

The evidence shows the County sometimes met or exceeded the Title 15 standard, and sometimes did not. Inmates fed in their cells had as long as they needed to eat. Inmates in the dining hall had approximately fifteen minutes to eat, but reconstructed times from television monitors occasionally fell 10% or 20% under that mark.

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[6] Plaintiffs referred to other claimed County shortcomings in various briefings, pretrial hearings, and at the trial, and requested to conform the pleadings to the proof if the trial evidence disclosed violations beyond those pled. (Plaintiffs' Trial Brief, pp. 7-10, filed November 24, 2004.) However, in their arguments at trial and the briefing that followed, the parties joined issue on the claims discussed here, and those are the ones upon which the Court will rule. No substantial issue was presented concerning other claims.

For § 1983 purposes, the Court can find no "purpose of punishment," deliberate indifference, or excessive conduct by the County, or a policy or custom to deny sufficient nutrition or sufficient time to eat. For Title 15 purposes, the Court finds the County's food service scheduling is reasonably related to the legitimate government purpose of serving a large number of people in a security-sensitive situation, and the County has exercised reasonable diligence to comply with the state's time standard.

2. Holding cells

Plaintiffs contend the County has a pervasive pattern and practice of maintaining overcrowded holding cells with inadequate seating, in violation of the Fourteenth Amendment and actionable under § 1983.

Overcrowding alone does not rise to the level of a constitutional violation. *Jenkins v. Velasco,* 1995 WL 765315, at *5 (N.D. Ill. 1995); *Hubbard v. Taylor,* 399 F.3d 150, 164 (3d Cir. 2005); *Malone v. Becher,* 2003 WL 22080737, at *10 (S.D. Ind. 2003); *Chavis v. Fairman,* 1994 WL 55719, at 3-4 (N.D. Ill. 1994); *Coughlin v. Sheahan,* 1995 WL 12255 at *3 n.3 (N.D. Ill. 1995). However, upon proof of excessive County "purpose of punishment" conduct, or crowding giving rise to other unconstitutional conditions, relief could be appropriate.

The evidence shows testimony by many inmate witnesses who did not experience overcrowding, but

some who said they did. There is no indication the occasional incidents of overcrowding were punitive in nature, deliberately indifferent, or were excessively harsh. The Court is unable to find the claimed occasions of overcrowding are pervasive or due to an improper policy or custom.

3. Outdoor exercise

Plaintiffs assert there is a pervasive and recurring County custom and practice of providing insufficient outdoor exercise in violation of both § 1983 and Title 15.

For § 1983 purposes, regular exercise of some type is crucial for the psychological and physical fitness of prisoners. *Bailey v. Shillinger,* 828 F.2d 651, 653 (10th Cir. 1987); *Spain v. Procunier,* 600 F.2d 189, 199 (9th Cir. 1979); *see also Wrice v. Koehler,* 1993 WL 300269, at *3 (N.D. Cal. 1993) (allegation pretrial detainees were denied all access to exercise stated a cognizable Fourteenth Amendment claim). However, "what constitutes adequate exercise will depend on the circumstances of each case, including the physical characteristics of the cell and jail and the average length of stay of the inmates." *Housley v. Dodson,* 41 F.3d 597, 599 (10th Cir. 1994); *accord Buffington v. O'Leary,* 748 F.Supp. 633, 634 (N.D. Ill. 1990) (no constitutional claim where a prisoner had a reasonable opportunity for exercise and did not allege any significant physical deterioration).

For example, in *Campbell v. Cauthron,* 623 F.2d 503, 507 (8th Cir. 1980), the Eighth Circuit held pretrial detainees are ordinarily entitled to one hour of exercise outside their cells each day if they spend more than sixteen hours in their cells. However, courts have held pretrial detainees have no fundamental right to exercise if they are incarcerated for a short time. *See, e.g., Wilson v. Blankenship,* 163 F.3d 1284, 1292 (11th Cir. 1998) (holding there is no "clearly established constitutional law" requiring a jail to provide access to outdoor exercise during time of incarceration when the term of incarceration was short).

Title 15, section 1065(a), provides for a combination of exercise and recreation. It calls for the facility administrator to develop written policies and procedures for an exercise and recreation program, in an area designated for recreation, allowing access a minimum of 3 hours per week. Although the Title 15 standard does not require it, outdoor exercise is preferable when possible. See, for example, Board of Corrections, *Minimum Standards for Local Detention Facilities* (1980). Title 15 does not contemplate that dayroom recreation cannot be part of the exercise and recreation combination.

The evidence does not show a constitutional violation. There is no indication of a "purpose of punishment," deliberate indifference, or excessiveness in the County's conduct in providing outdoor exercise, or a showing of inmate physical deterioration. No policy or custom to provide inadequate exercise has

been shown. The evidence shows the County's compliance with the exercise/recreation requirement of Title 15 is reasonably related to the legitimate purpose of providing for movement and security of numerous inmates, and the County has used reasonable diligence.

4. Dayroom access

Plaintiffs argue the County has unconstitutionally denied inmates adequate dayroom access.

The Court finds no authority holding dayroom access is, by itself, a constitutional requirement. However, lack of such access, accompanied by other oppressive conditions, can be a constitutional violation. *See, for example, Lareau v. Manson,* 651 F.2d 96, 105 (2d Cir. 1981) (combination of double-bunked cells, overcrowded dayrooms, and strained prison services over substantial time held unconstitutional punishment). Cases cited by Plaintiffs for the proposition that two hours per day of dayroom are constitutionally required do not so hold. *Demery v. Arpaio,* 378 F.3d 1020 (9th Cir. 2004) (use of "webcam" to display inmates on Internet; no dayroom issue); *Halvorsen v. Baird,* 146 F.3d 680 (9th Cir. 1998) (inmate held incommunicado; no dayroom issue).

The evidence shows that, in general, the County provided dayroom access to inmates. Some incidents of particular inmates failing to receive full scheduled dayroom access were shown. However, the evidence does not establish any dayroom deprivation was for

the purpose of punishment, or that the County behaved with deliberate indifference, or in an excessive manner, or with a policy or custom to deny meaningful dayroom use. There was no showing lack of dayroom access combined with other factors to create a constitutionally oppressive jail condition.

5. Access to religious services

Plaintiffs assert the County has engaged in a pervasive and recurring custom and practice of denying access to religious services in violation of § 1983.

Under the Constitution, "reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments." *Cruz v. Beto,* 405 U.S. 319, 322 n.2 (1972). However, prison regulations limiting inmates' free religious exercise do not violate the First Amendment so long as they are reasonably related to a legitimate penological interest. *Turner v. Safley,* 482 U.S. 78, 89 (1987). Title 15 § 1072 requires the facility administrator to develop written policies and procedures giving inmates the opportunity to voluntarily participate in religious services and counseling. Neither the Constitution nor Title 15 fixes mandatory minimums.

The evidence shows the County does provide opportunities for inmates to participate in religious services and counseling. Occasional instances of impediments to participation were also shown. However, the Court cannot find the sporadic denials of

religious service access were for the purpose of punishment, or showed excessive or oppressive conduct or deliberate indifference by the County. No policy or custom of denial of this basic right was shown. The County has exercised reasonable diligence, in view of its legitimate governmental purpose in housing many diverse inmates in a security-sensitive environment.

6. Conclusion

The Court does not find a § 1983 (*Monell*) constitutional violation or a state Title 15 violation.

C. DISABILITY COMPLIANCE

Plaintiffs contend the Orange County jails are not in compliance with federal or state disabled access requirements, and seek a declaration of such noncompliance and injunctive relief to cure it.

Title II of the Americans with Disabilities Act ("ADA") provides: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The ADA prohibits public entities from discriminating against disabled persons or excluding disabled persons from participating in or benefiting from a public program, activity, or service solely by reason of disability. *Weinreich v. Los Angeles County Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th

Cir. 1997). A violation of the federal ADA is also a violation of the California Disabled Persons Act, California Civil Code §§ 54(c) and 54.1(d).

The ADA applies to all state and local government agencies, including correctional or detention facilities. *Armstrong v. Wilson,* 124 F.3d 1019, 1022-23 (9th Cir. 1997); *Pa. Dep't of Corr. v. Yeskey,* 524 U.S. 206, 209 (1998) (state prisons); *Bogovich v. Sandoval,* 189 F.3d 999, 1002 (9th Cir. 1999) (same). The ADA's broad language covers "anything a public entity does." *Pennsylvania Dep't of Corr. v. Yeskey,* 118 F.3d 168, 171 (3d Cir. 1997), *aff'd* 524 U.S. 206 (1998). This includes programs or services provided at jails, prisons, and any other "custodial or correctional institution." *Id.* Here, the ADA applies to Orange County's five jails.

Programs provided in the jail environment are "services, programs, or activities of a public entity" under the ADA. *Armstrong,* 124 F.3d at 1023-24; *see also Yeskey,* 524 U.S. at 209-10.

For providing equal access to services, programs, or activities for disabled inmates, the test is one of "reasonableness": public entities are required to make "reasonable" modifications in policies, practices, or procedures when the modifications are necessary to avoid disability discrimination, unless the public entity can show the modifications would fundamentally alter the nature of the service, program, or activity. *McGary v. City of Portland,* 386 F.3d 1259, 1265-67 (9th Cir. 2004), citing 28 C.F.R. § 35.130(b)(7).

The access standards require a public entity to operate a service, program, or activity so that, when viewed in its entirety, it is readily accessible and usable by disabled individuals. The public entity is required to develop a transition plan for structural changes to make programs accessible. *Barden v. City of Sacramento,* 292 F.3d 1073, 1075-76 (9th Cir. 2002).

1. Barriers

Unlike a public accommodation (covered by Title III) which must remove architectural barriers whenever "readily achievable," a public entity (covered by Title II) is not required to make structural changes in existing facilities where other methods are effective in achieving compliance. 28 C.F.R. § 35.150(b)(1); *Shotz v. Cates,* 256 F.3d 1077, 1080 (11th Cir. 2001); *Parker v. Universidad de Puerto Rico,* 225 F.3d 1, 6 (1st Cir. 2000). For example, if one facility is inaccessible, a public entity may comply with Title II by making its services, programs, and activities available at another facility that is accessible. *Shotz,* 256 F.3d at 1080.

Cases applying the ADA to a prison setting are few, but reference to cases decided under the earlier Rehabilitation Act is helpful. The interchangeability of such decisional law between the two is appropriate. *Parker,* 225 F.3d at 4; *Theriault v. Flynn,* 162 F.3d 46, 48 n.3 (1st Cir. 1998); *Gorman v. Bartch,* 152 F.3d 907, 912 (8th Cir. 1998).

Although noting the Rehabilitation Act applied to a prison setting, the Ninth Circuit acknowledged the Act was not designed to deal specifically with the prison environment, but was for general societal application, and consideration must be given to the reasonable requirements of effective prison administration. *Gates v. Rowland,* 39 F.3d 1439, 1446-47 (9th Cir. 1994). Concerning disabilities, an impingement on an inmate's rights is acceptable if it is reasonably related to legitimate penological interests. *Gates,* at 1447. The inmate has the burden of showing a challenged prison policy or regulation is unreasonable. *Turner,* 482 U.S. at 89-91; *Casey v. Lewis,* 4 F.3d 1516, 1520 (9th Cir. 1993).

The evidence in this case shows that, although significant efforts have been made, the Orange County jails have not yet been brought into full ADA compliance. In 2000, Orange County adopted a Transition Plan to move existing facilities toward ADA compliance. That plan was directed more toward structural modifications of public and visitor areas than toward compliance in inmate areas. Substantial upgrades were made under that plan. As trial of this lawsuit approached, additional significant structural modifications were made.

Certain inmate witnesses and Plaintiffs' expert, Mr. Robertson, identified various specific architectural barriers and features that are out of compliance

with the ADA.[7] However, this initial showing falls short of the required additional showing to justify declaratory or injunctive action by this Court. Other than broad conclusory statements that Mr. Robertson thought the items could be fixed, there was no analysis, cost study, or proposal about how effective modifications could be made. There was no significant showing that, where an architectural shortcoming existed, it was not made accessible by other appropriate action taken by a jail employee.[8] Where structural corrections were not yet accomplished, there was no significant Plaintiffs' showing that other methods were ineffective in achieving compliance, while there was significant defense evidence that other curative methods were effective. The evidence shows certain areas of ADA noncompliance are within the reasonable requirements of effective prison administration.

In summary concerning the existence of barriers for disabled inmates, the evidence shows some do

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[7] Mr. Robertson was Plaintiffs' expert, but his testimony was of limited value. Plaintiffs had assigned him the limited task of looking only at existing conditions and commenting on what he saw. He made no study of expenses or methods to fix specific shortcomings. He did not evaluate whether other methods were effective in achieving compliance. He seldom testified about specific problems, but frequently talked about what was "typically" present. He made no analysis of accessability [illegible] to programs or mainstreaming.

[8] For example, where a small "lip" or ridge existed when passing from one cell area to another, or into the exercise area, a deputy would simply roll an inmate's wheelchair over the obstacle.

exist, but the rest of the required showing was not made. On the contrary, the defense showed other effective remedies are in use, and decisions are being made concerning structural modifications in keeping with effective prison administration and based on legitimate penological interests.

2. Program access

Concerning access to programs, the evidence shows that, except for the "Best Choice" program, the various inmate programs are also available to disabled inmates. The various programs may be available only at accessible facilities rather than all facilities, but that is proper compliance. Captain Board testified there are security concerns about disabled inmates participating in the "Best Choice" program, and this legitimate penological interest was not rebutted. In summary concerning access to programs, there was an inadequate showing of the "reasonableness" of requiring modifications. The facts taken as a whole show the County is acting in a reasonable manner, making programs readily accessible and usable, with due regard to legitimate penological interests.

The evidence shows it would not be reasonable to order "mainstreaming" of disabled inmates. Legitimate penological interests show this would not be appropriate. Programs, activities, and facilities are readily accessible and usable without "mainstreaming."

3. Conclusion

The County is not yet in full ADA compliance, and it can reasonably be expected to move toward full compliance. There has been no showing the County will shirk that responsibility. The law requires reasonable modifications, taking into account legitimate penological interests. Plaintiffs have not shown violation of that standard. The Court declines to declare an ADA or California Civil Code violation, or order injunctive relief.

D. DISPOSITION

The evidence shows there is much room for improvement by the County, particularly in areas of record-keeping and documentation, inmate grievance procedure, inmate exercise, access to religious services, and disabled access. However, improvement is always a necessary goal, and the County and its Sheriff show every indication they will perform that high duty. On the evidence presented, there is no actionable federal or state violation.

The Court has considered all factors on the issue of a prevailing party, and finds there is no prevailing party in this case.

Judgment shall be entered in favor of defendant County.

DATED: April 27, 2005 /s/ Gary L. Taylor
GARY TAYLOR
UNITED STATES
DISTRICT JUDGE

105

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Supreme Court, U.S.
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No. 08-195

IN THE
Supreme Court of the United States

COUNTY OF ORANGE,

Petitioner,

v.

FRED PIERCE, TIMOTHY LEE CONN, FERMIN VALENZUELA, and LAURIE D. ELLERTSON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

I. DID THE NINTH CIRCUIT CONDUCT A NARROW FACT SPECIFIC INQUIRY INTO OUT-OF-CELL EXERCISE REQUIREMENTS FOR PRE-TRIAL DETAINEES UNDER THE FOURTEENTH AMENDMENT AND NOT ISSUE A BRIGHT-LINE RULE UNDER THE EIGHTH AMENDMENT, AS PETITIONER CONTENDS?

II. DID THE NINTH CIRCUIT CORRECTLY APPLY THE "CLEARLY ERRONEOUS" STANDARD OF REVIEW TO THE TWO FACTUAL FINDINGS AT ISSUE IN THE PETITION?

III. DID THE NINTH CIRCUIT PROPERLY DELEGATE TO THE DISTRICT COURT RESPONSIBILITY FOR DETERMINING HOW THE COUNTY COULD BEST ADJUST PROGRAM AND SERVICE OFFERINGS TO ACCOMMODATE THE NEEDS OF DISABLED DETAINEES?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

SUMMARY OF THE ARGUMENT 1

REASONS FOR DENYING THE PETITION .. 3

I. BECAUSE THE NINTH CIRCUIT DID NOT RULE THAT NINETY MINUTES OF EXERCISE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT OR EVEN APPLY EIGHTH AMENDMENT STANDARDS, THIS CASE CREATES NO INTER-CIRCUIT CONFLICT 3

II. THE NINTH CIRCUIT CORRECTLY APPLIED THE "CLEARLY ERRONEOUS" STANDARD OF REVIEW TO THE TWO FACTUAL FINDINGS AT ISSUE IN THE PETITION 11

A. The Ninth Circuit Affirmed The Majority of the District Court's Factual Findings 12

B. The Ninth Circuit Correctly Applied the Clearly Erroneous Standard to Overturn Two District Court Findings that Were Unsupported by and Contrary to the Record 15

1. The Ninth Circuit Correctly Overturned the District Court's Finding With Respect to Architectural Barriers 16

2. The Ninth Circuit Correctly Overturned the District Court's Finding With Respect to Access to Programs, Services and Activities 18

3. The Ninth Circuit's Decision With Respect to the ADA Issues is not Final Because it Requires The District Court To Make Further Factual Findings 23

III. THE NINTH CIRCUIT PROPERLY DELEGATED TO THE DISTRICT COURT RESPONSIBILITY FOR DETERMINING HOW THE COUNTY COULD BEST ADJUST PROGRAM AND SERVICE OFFERINGS TO ACCOMMODATE THE NEEDS OF DISABLED DETAINEES 24

CONCLUSION 32

TABLE OF AUTHORITIES

FEDERAL CASES

Page(s)

Anderson v. Bessemer City
470 U.S. 564 (1985) 15

Bailey v. Shillinger
828 F.2d 651 (10th Cir. 1987) 3, 6

Bell v. Wolfish
441 U.S. 520 (1979) 4, 5

Caldwell v. Miller
790 F.2d 589 (7th Cir. 1986) 3, 6

Campbell v. Cauthron
623 F.2d 503 (8th Cir. 1980) 8, 10

Davenport v. DeRobertis
844 F.2d 1310 (7th Cir. 1988) 7, 11

Delaney v. DeTella
256 F.3d 679 (7th Cir. 2001) 8

French v. Owens
777F.2d 1250, 1255 (7th Cir. 1985) 8

Gillespie v. United States Steel Corp.
379 U.S. 148 (1964) 24

Hosna v. Groose
80 F.3d 298 (8th Cir. 1996) 8

Housley v. Dodson
41 F.3d 597 (10th Cir. 1994) 9, 10

Hughes Tool Co. v. TWA
409 U.S. 363 (1973) 24

Kirby v. Blackledge
530 F.2d 583 (4th Cir. 1976) 8

Loe v. Wilkinson
604 F.Supp. 130 (M.D. Pa. 1984) 8

Pa. Department of Correctional v. Yeskey
524 U.S. 206 (1998) 25, 26

Patterson v. Mintzes
717 F.2d 284 (6th Cir. 1983) 5, 8

Peterkin v. Jeffes
661 F.Supp. 895 (3d Cir. 1988) 7, 8, 11

Rhodes v. Chapman
452 U.S. 337 (1981) 4

Rodgers v. Jabe
43 F.3d 1082 (6th Cir. 1995) 3, 5

Ruiz v. Estelle
679 F.2d 1115 (5th Cir. 1982) 7, 8, 10

Spain v. Procunier
600 F.2d 189 (9th Cir. 1979) 6, 8, 9

Union County Jail Inmates v. Di Buono
713 F.2d 984 (3rd Cir. 1983) 9

United States v. Virginia
518 U.S. 515 (1996) 30, 31

Walker v. Mintzes
771 F.2d 920 (6th Cir. 1985) 6

Wishon v. Gammon
978 F.2d 446 (8th Cir. 1992) 3

Women Prisoners of the District of Colombia Department of Corrections v. District of Columbia
93 F.3d 910 (D.C.Cir. 1996) 8, 29, 30

FEDERAL STATUTES

28 C.F.R. 35.150 . . . . . 21, 29

42 U.S.C. 12132 24

United States Supreme Court Rule 10 12

SUMMARY OF THE ARGUMENT

Review should be denied on the questions presented as Petitioner cannot show that the Ninth Circuit's decision below is in conflict with a decision of this Court, much less that it creates a conflict on an important federal question within the circuits.

Petitioner's assertion that the decision creates an inter-circuit conflict on the issue of outdoor exercise requirements in correctional settings is without basis. The Ninth Circuit did not announce a "bright line" rule that ninety minutes of weekly exercise constitutes cruel and unusual punishment under the Eighth Amendment. Neither the Eighth Amendment nor the "cruel and unusual punishment" standard are discussed anywhere in the opinion, which instead applies only to pre-trial detainees and relies only on the Fourteenth Amendment. The court below applied the correct legal standards and issued a narrow fact-specific finding, drawing on well-accepted law from other circuits, which properly considered the unique circumstances facing administrative segregation detainees in the Orange County jails. There is no conflict between this opinion and that of this Court or any circuit.

Petitioner's argument that *certiorari* should be granted to review two factual findings reversed by the Ninth Circuit does not raise any "compelling reasons" for Supreme Court review. The Ninth Circuit affirmed the vast majority of the factual findings by the district court. With respect to the two factual findings that the Ninth Circuit overturned, the Ninth Circuit did so only after concluding that the district court's findings were unsupported by and contrary to the record. The Ninth

Circuit's methodology was appropriate, and further appellate review is unwarranted.

Finally, Petitioner seeks review of the Ninth Circuit's decision to remand to the district court for further fact-finding as to whether and how the Orange County jails could provide more equal access to disabled detainees to the services and programs provided to non-disabled detainees. Petitioner cannot point to any inter-circuit conflict or conflict with an opinion of this Court, but rather seeks *certiorari* because of budget constraints which it claims may reduce the overall programs and services provided to detainees. Given the Ninth Circuit's instructions to the district court that absolute parity in programming need not be achieved and that correctional concerns should be given proper consideration, the decision should not be disturbed. The district court should be permitted to conduct the type of fact-finding necessary to address denial of program access under the Americans with Disabilities Act, 42 U.S.C. §12132.

REASONS FOR DENYING THE PETITION

I. BECAUSE THE NINTH CIRCUIT DID NOT RULE THAT NINETY MINUTES OF EXERCISE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT OR EVEN APPLY EIGHTH AMENDMENT STANDARDS, THIS CASE CREATES NO INTER-CIRCUIT CONFLICT

Petitioner asserts incorrectly that the Ninth Circuit announced below a "bright line rule that ninety minutes of weekly exercise constitutes cruel and unusual punishment" under the Eighth Amendment, and based on this, argues that an inter-circuit conflict now exists. Pet. at 8. The Ninth Circuit, however, did not apply the Eighth Amendment analysis, nor once mention "cruel and unusual punishment," as this case involves pre-trial detainees, whose rights are protected under the Due Process Clause of the Fourteenth Amendment, not the Eighth Amendment. Significantly, every one of the cases cited by Petitioner as evidence of a conflict within the circuits involved the rights of prisoners (governed by the Eighth Amendment), as opposed to the greater rights afforded to pre-trial detainees. *See, e.g., Bailey v. Shillinger,* 828 F.2d 651, 652 (10th Cir. 1987) (prisoner convicted of first degree murder and then sentenced to heightened security after murdering another prisoner); *Rodgers v. Jabe,* 43 F.3d 1082, 1084 (6th Cir. 1995)(prisoner in maximum security who engaged in such serious misconduct while in prison that he was placed in detention, where he complained about lack of exercise); *Wishon v. Gammon,* 978 F.2d 446 (8th Cir. 1992)(prisoner who was allowed significant out-of-cell time each week for meetings, visits, medical care, phone calls and haircuts); *Caldwell v. Miller,* 790 F.2d 589, 600 (7th Cir.

1986)(prisoner's claim of inadequate exercise reviewed under Eighth Amendment).

These cases have no precedential value for the question of a pre-trial detainee's right to outdoor exercise. This Court has long held that for conditions of confinement in *prisons* to constitute cruel and unusual punishment within the meaning of the Eighth Amendment, the conditions "must . . . involve the wanton and unnecessary infliction of pain, [or] be grossly disproportionate to the severity of the crime warranting imprisonment." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

A very different standard applies to pre-trial detainees, who have not been convicted of any crime. Pre-trial detainees are protected by the Fourteenth Amendment's Due Process Clause. Under the Due Process Clause, detainees have a right against any jail conditions or restrictions that "amount to punishment." *Bell v. Wolfish*, 441 U.S. 520 (1979). This Court in *Bell* underscored that this standard differs significantly from the standard relevant to convicted prisoners. *Id.*, at 535, n. 16. The Ninth Circuit below expressly incorporated the proper standard of review announced in *Bell*, in concluding that ninety minutes of exercise per week, on the facts before the court, "constitutes punishment for purposes of § 1983." App. 49.

Petitioner distorts the holding of the court below, failing to bring to this Court's attention that the cases on which it relies all involved prisoners and different constitutional standards than those which apply to pre-trial detainees. Moreover, Petitioner states no less than four times in its petition that the Ninth Circuit held that less than two hours of exercise a day constitutes "cruel and unusual punishment." (Pet.

Brief at 10 and 14.) Petitioner goes so far as to state: "the declaration that 90 minutes of week exercise constitutes cruel and unusual punishment has brought to an intense boil what up to now might have only been a simmering circuit conflict." (Pet. Brief at 14.) These statements are plainly inaccurate as the Ninth Circuit did not once refer to the Eighth Amendment standard, did not use the expression "cruel or unusual" anywhere in its discussion and nothing in the opinion could be construed to apply to prisoners. Moreover, Petitioner tellingly omits any mention of *Bell v. Wolfish*, the leading opinion from this Court explaining the constitutional standards for evaluating pre-trial detainees' constitutional rights.

Examination of the actual cases cited by Petitioner as part of this "boiling" inter-circuit conflict, reveal that not only do they all involve convicted prisoners, but many are decided on facts far different than those considered here. For example, in *Rodgers*, 43 F.3d 1082, the question before the Sixth Circuit was whether a prisoner in punitive detention for "major misconduct" violations was entitled to out-of-cell exercise. The court held that in the Sixth Circuit there was no clearly established right to out-of-cell exercise while in punitive detention, thereby granting qualified immunity to prison officials. This holding is not at odds with the *Pierce* decision, as *Pierce* did not concern prisoners, and did not consider the question of constitutional minimums for those who, while in custody, have engaged in misconduct sufficient to warrant *additional* punishment.[1]

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[1] The other cases from the Sixth Circuit relied upon by Petitioner are also not in conflict with the *Pierce* decision. In *Patterson v. Mintzes*, 717 F.2d 284 (6th Cir. 1983), the court held

The Tenth Circuit's decision in *Bailey*, 828 F.2d at 652, also does not create an inter-circuit conflict, as it too relates to the treatment of prisoners. While the court there found that one hour per week of exercise did not amount to the "wanton and unnecessary infliction of pain," the standard for cruel and unusual punishment, the court did not consider whether one hour per week would have satisfied constitutional requirements for pre-trial detainees. Similarly, in *Caldwell*, 790 F.2d 589, the Seventh Circuit considered whether an hour of weekly outdoor exercise in the prison context constituted cruel and unusual punishment, concluding because the plaintiff could not meet the Eighth Amendment standard of "unnecessary or wanton pain," he had failed to establish a constitutional violation.

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that the denial of outdoor exercise could be a constitutional violation depending on certain facts which had not been developed sufficiently in the record, e.g. size of cell, opportunity for contact with other inmates, and time per day allowed outside of the cell. The court did not opine one way or another as to what the minimum might be for detainees held in administrative segregation, such as here, without contact with other detainees or time outside the cell.

In *Walker v. Mintzes*, 771 F.2d 920 (6th Cir. 1985), the court again did not rule out minimum exercise time for prisoners. The case was remanded to the district court because the jail gave less exercise to prisoners in administrative segregation than to those in general population, conflicting with the principle announced in *Patterson* that prisoners in more isolated settings might be entitled to more rather than less out-of-cell exercise. *Walker approved* the Ninth Circuit's decision in *Spain v. Procunier*, 600 F.2d 189, 199 (9th Cir. 1979), that five hours of outdoor exercise per week are required for those inmates who were "permanently confined virtually the entire day in one cell, received 'meager' outside movement, and engaged in minimal prisoner contact." *Id.*, at 927.

Petitioner also insists that a conflict between the circuits may have existed even before the publication of the *Pierce* decision, but here again Petitioner relies on inapplicable cases interpreting Eighth Amendment standards for convicted prisoners. For example, Petitioner points to *Peterkin v. Jeffes*, 855 F.2d 1021 (3rd Cir. 1988), as an example of conflicting case law, yet *Peterkin* refused to reach the constitutional question of what is a required minimum, merely holding that two hours per day, as provided to the particular prisoners in that case, was not unconstitutional under the Eighth Amendment. *Ruiz v. Estelle,* 679 F.2d 1115, 1152 (5th Cir.1982),also did not create conflicting law as the 5th Circuit there merely found that it was not an abuse of discretion under the unique facts of the case for the district court to require convicted prisoners to receive one hour per day of out-of-cell exercise, *Ruiz*, however, set no constitutional minimum for all prison settings. Similarly, *Davenport v. DeRobertis,* 844 F.2d 1310, 1316 (7th Cir. 1988), is limited to its facts; the Seventh Circuit held that it was not an abuse of discretion for the district court to issue a "fact specific" order that five hours of out-of-cell exercise was required each week for prisoners who were otherwise required to spend "165 out of 168 hours in a 90-square-foot cage."

In sum, each of the cases relied upon by Petitioner to urge this Court to resolve a supposedly urgent and compelling inter-circuit conflict involves examination of an entirely different constitutional amendment, different constitutional standards, and different unique facts.[2]

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[2] In a footnote, Petitioner also claims there is an inter-circuit conflict because several circuits require "proof of injury" to

Nor is review warranted on the ground that the opinion's handling of pre-trial detainee exercise conflicts with relevant federal decisional law. The basic premise underlying the Ninth Circuit's opinion – that meaningful recreation "is extremely important to the psychological and physical well-being of the inmates" – is virtually unquestioned in the circuit courts. *Spain v. Procunier*, 600 F.2d 189, 199 (9th Cir. 1979). *See also Ruiz, supra* 679 F.2d at 1152 ("Inmates need regular exercise to maintain reasonably good physical and psychological health"); *Patterson v. Mintzes*, 717 F.2d 284, 289 (6th Cir. 1983); *Campbell v. Cauthron*, 623 F.2d 503, 506-07 (8th Cir. 1980); *Kirby v. Blackledge*, 530 F.2d 583, 587 (4th Cir. 1976); *Loe v. Wilkinson*, 604 F. Supp. 130, 135 (M.D. Pa. 1984); *Peterkin, supra* 855 F.2d at 1031; *Delaney v. DeTella*, 256 F.3d 679 (7th Cir. 2001)("Given current norms, exercise is no longer considered an optional form of recreation, but is instead a necessary requirement for physical and mental well-being" in correctional settings).

While Petitioner argues that the Ninth Circuit

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establish an Eighth Amendment violation, and the court in *Pierce* did not require plaintiffs to prove that denial of exercise caused an actual injury. There is no conflict, however, because *Pierce* is decided under the Fourteenth Amendment's Due Process Clause and no court has required "proof of injury" in evaluating whether jail conditions amount to punishment under the Fourteenth Amendment; that inquiry, to the extent some courts have adopted it, relates only to Eighth Amendment claims of "cruel or unusual" punishment. *French v. Owens*, 777F.2d 1250, 1255 (7th Cir. 1995) (prisoners seeking relief under Eighth Amendment); *Hosna v. Groose*, 80 F.3d 298, 307 (8th Cir. 1986) (same); *Women Prisoners of the District of Colombia Dept. of Corrections v. District of Columbia*, 93 F.3d 910 (D.C.Cir. 1996)(same).

has now created a "bright line" requirement for outdoor exercise which applies to all penal settings, this seriously misstates the opinion below. The Ninth Circuit, in fact, engaged in the type of "fact specific," careful analysis cautioned by all of the courts, including the Ninth, in considering claims to outdoor exercise in correctional settings. As had been the case in *Spain*,[3] and subsequent Ninth Circuit decisions, the *Pierce* panel analyzed the particular group of detainees asking for outdoor exercise and evaluated the particularly circumstances of their incarceration to determine whether a certain amount of exercise was insufficient. Indeed, the Ninth Circuit cited Tenth Circuit law in announcing the factors courts should review: "determining what constitutes adequate exercise requires consideration of 'the physical characteristics of the cell and jail and the average length of stay of the inmates.'" App. at 46, citing *Housley v. Dodson*, 41 F.3d 597, 599 (10th Cir. 1994).

In so ruling, the Ninth Circuit's opinion is fully consistent with that of other circuits, holding that any determination of whether jail or prison conditions meet constitutional requirements for exercise, must examine such factors as overall condition of the jails, average length of incarceration and amount of out-of-cell time. *See, e.g., Union County Jail Inmates v. Di Buono*, 713 F.2d 984, 1000-1001 (3rd Cir. 1983) (in assessing "the totality of circumstances relevant to any alleged constitutional deficiency in shelter," courts should

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[3] Rather than expanding the constitutional standard announced nearly 30 years ago in *Spain*, the Ninth Circuit here may indeed have restricted it, finding only two hours of outdoor exercise minimally required and not the five hours per week announced in *Spain*.

consider, in addition to the "general state of repair and function of the facilities provided," the length of confinement in the prison, and how much time prisoners must spend in their cells each day); *see also Ruiz v. Estelle*, 679 F.2d 1115, 1152 (5th Cir. 1988).

Ultimately, the Ninth Circuit held that pre-trial detainees in the type of administrative segregation system used by Orange County are entitled to at least two hours of outdoor exercise per week. These detainees are those who, the court found, by definition have no access to other detainees and are kept locked in their individual cells at least 22 hours per day. (App.46). The court also found that the average stay for such detainees was 110 days, with those accused of "three strike" offenses spending an average of 312 days in jail. *Id.* Thus, the panel's decision is fully consistent with the very requirement which Petitioner seeks to impose, namely that the inquiry be fact-specific and not a bright-line rule applicable to all detainees and all custodial settings.

The *Pierce* decision follows other circuit decisions that denial of exercise in certain circumstances can violate the constitution's requirements for confinement of pre-trial detainees. For example, *Pierce* cites and follows the Eighth Circuit's decision in *Campbell,* 623 F.2d 503 at 508, which held that pre-trial detainees are generally entitled to one hour of exercise outside of their cells daily if they spend more than sixteen hours in their cells daily, and the Tenth Circuit's conclusion in *Housley*, 41 F.3d at 599, that "'a failure to provide inmates (confined for more than a very short period ...) with the opportunity for at least five hours a week of exercise outside the cell raises serious constitutional questions'").

Finally, in terms of the actual results at issue, the amount of exercise found required by the Ninth Circuit imposes a very low bar, far below the amount of exercise recommended by correctional experts and followed in correctional facilities throughout the nation. For example, the district court in *Peterkin* found that nationwide, prisons provide an average of three hours of daily outdoor exercise for death-sentenced inmates, *far more than the two hours per week allotted here. See Peterkin v. Jeffes*, 661 F. Supp. 895, 911 (E.D.Pa. 1987) (emphasis added). Similarly, the Seventh Circuit in *Davenport*, in upholding the district court's determination that one hour per week for prisoners kept in small cage-like cells was inadequate, noted that "[a] knowledgeable witness testified that he [knew] of no other prison in the United States, including the federal penitentiary at Marion, Illinois--the nation's highest-security prison--that allows inmates of its segregation unit so little time for out-of-cell exercise." 844 F.2d at 1315. Thus, the Ninth Circuit's relatively limited requirement of two hours per week of outdoor exercise for the detainees under consideration cannot be construed as imposing a difficult minimum which will cause any hardship or disruption to jail facilities in other circuits, given that few are likely to fall below this standard in the first place.

II. THE NINTH CIRCUIT CORRECTLY APPLIED THE "CLEARLY ERRONEOUS" STANDARD OF REVIEW TO THE TWO FACTUAL FINDINGS AT ISSUE IN THE PETITION

The only issue raised in Part II of the petition is whether the Ninth Circuit erred in holding two of the district court's dozens of factual findings clearly

erroneous. Specifically, Petitioner argues that the Ninth Circuit misapplied the "clearly erroneous" standard of review to the district court's two discrete findings that: (1) disabled detainees had equal access to programs at the jails; and (2) the existence of physical barriers in the jails did not rise to the level of an ADA violation. Petitioner does not assert that the Ninth Circuit articulated the wrong standard of review, or that the Ninth Circuit erred in its review of the district court's numerous other factual findings. Part II of the petition simply does not raise any "compelling reasons" for Supreme Court review because the Ninth Circuit has not "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of [the] Court's supervisory power." S. Ct. Rule 10. Accordingly, the petition should be denied.

A. The Ninth Circuit Affirmed The Majority of the District Court's Factual Findings

The narrow nature of Petitioner's request for review is evident when assessed in the context of the entire Ninth Circuit opinion. The Ninth Circuit affirmed all of the district court's pretrial and evidentiary rulings, deferring, for example, to the lower court's discretion to hear all of the evidence in a complex class-action lawsuit in six days. App. 15-27. The Ninth Circuit also affirmed the majority of the district court's factual findings. Significantly, the Ninth Circuit affirmed the district court's class-wide factual findings that termination of eleven of the fourteen *Stewart* Orders was appropriate. App. 32-37, 50. In this portion of its opinion, the Ninth Circuit explicitly agreed with the district court's findings that the *Stewart* Orders related to reading materials,

mattresses and beds, law books, population caps, sleep, blankets, telephone access, communications with jailhouse lawyers, seating, meal times and day room access were no longer needed to correct ongoing constitutional violations. *Id.*

Although the Ninth Circuit held that the district court clearly erred in terminating the two *Stewart* Orders relating to religious services and exercise, Petitioner does not argue in the body of the petition that these holdings constitute error or warrant Supreme Court review.[4] Thus, the Ninth Circuit's review of the district court's factual findings regarding the constitutional issues applicable to the entire *Pierce* class is not at issue in this petition.

The Ninth Circuit also affirmed a significant portion of the district court's treatment of ADA issues related to a subclass of mobility- and dexterity-impaired detainees. For example, the district court "found the evidence to show that 'the Orange County jails have not yet been brought into full ADA compliance. In 2000, Orange County adopted a Transition Plan to move existing facilities toward ADA compliance. That plan was directed more toward structural modifications of public and visitor areas than toward compliance in detainee areas.'" App. 60 (quoting the district court's decision). The district

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[4]Presumably, Petitioner does not seek review of this aspect of the Ninth Circuit's decision because the district court failed to cite a single piece of evidence to support its conclusory statements that the *Stewart* Orders regarding religious services and outdoor exercise were no longer necessary. App. 92-94 (exercise), 95-96 (religious services). The Ninth Circuit, by contrast, set forth a detailed analysis supporting its holdings that the district court clearly erred in its findings in these two areas. App. 37-49.

court relied on the testimony of Plaintiffs' expert, Peter Robertson, who "'identified various specific architectural barriers and features that are out of compliance with the ADA.'" App. 60-61.

The Ninth Circuit affirmed these findings as "clearly supported by the record," and listed several examples of architectural barriers that failed to comply with the ADA. App. 61-63. The Ninth Circuit observed that Mr. Robertson testified "at length" regarding the deficient architectural barriers and features, and that defendants' expert, Ron Bihner, did not dispute Mr. Robertson's testimony. The Ninth Circuit further noted that Mr. Bihner conceded that a number of architectural barriers and features, such as showers, toilets and sinks, were not accessible to mobility-impaired detainees. App. 62.

The Ninth Circuit also affirmed the district court's finding that segregating disabled detainees was reasonably related to legitimate penological interests, and that mainstreaming was therefore not appropriate. To support its deference to the lower court's findings, the Ninth Circuit observed that "Sheriff's Department officials testified at some length regarding the security concerns related to housing mobility- and dexterity-impaired detainees with non-disabled detainees. The district court's finding that Plaintiffs did not refute this evidence is not clearly erroneous." App. 68. The Ninth Circuit further affirmed the district court's factual finding that disabled detainees need not be given access to the "Best Choice Program" (a drug rehabilitation program) because of security concerns. App. 72 n. 39.

As this discussion makes clear, the nature of the review that Petitioner seeks is extremely limited. The

Ninth Circuit affirmed the majority of the district court's factual findings. None of the factual findings with respect to the class-wide constitutional claims is at issue. The Ninth Circuit also affirmed many of the district court's factual findings regarding the ADA issues. The limited nature of the review sought serves to distinguish this case from *Anderson v. Bessemer City*, 470 U.S. 564 (1985), upon which Petitioner relies extensively. In *Bessemer*, the Court of Appeals engaged in a *de novo* review of the district court's factual findings, and reversed nearly all of the key findings made by the court. Here, the Ninth Circuit did no such thing. The Ninth Circuit in fact affirmed most of the key findings made by the district court, and, as discussed in the next section, adhered to the *Bessemer* guidelines for reviewing district court findings for clear error. For these reasons, the Supreme Court should decline to grant review here.

B. The Ninth Circuit Correctly Applied the Clearly Erroneous Standard to Overturn Two District Court Findings that Were Unsupported by and Contrary to the Record

With respect to the two factual findings that the Ninth Circuit overturned, the Ninth Circuit did so only after concluding that the district court's findings were unsupported by and contrary to the record. The Ninth Circuit's methodology was appropriate, and further appellate review is unwarranted.

1. The Ninth Circuit Correctly Overturned the District Court's Finding With Respect to Architectural Barriers

First, with respect to architectural barriers, the Ninth Circuit concluded that the district court clearly erred when it concluded that Plaintiffs had failed to show the existence of reasonable accommodations that would enable them to make use of the facilities. The Ninth Circuit cited the testimony of Plaintiffs' expert, Mr. Robertson, which included "site-specific suggestions of structural, as well as non-structural, accommodations." App. 64. As noted by the Ninth Circuit, Mr. Robertson proposed specific architectural changes such as repositioning the sinks or replacement of controls, and he also offered solutions like making an inaccessible drinking fountain accessible by adding a cup dispenser. In making these proposals, Mr. Robertson relied upon established federal guidelines which set forth the minimum standards for structural changes. *Id.*

Petitioner argues that the Ninth Circuit failed to defer to the district court's finding that Mr. Robertson's testimony was "limited" because he did not include any "analysis" or "proposal" about how effective modifications could be made. However, the Ninth Circuit appropriately rejected the district court's characterization of Mr. Robertson's testimony because the record plainly shows that Mr. Robertson *did* provide analysis and specific proposals about how architectural barriers could easily be modified, such as adding a cup dispenser to inaccessible drinking fountains.

The Ninth Circuit held that the lower court's

finding that the jails did provide "other curative methods" to inmates with disabilities was also unsupported by the record. Based on the evidence in the record, the only architectural barriers that were remedied by "other methods" were small surface-elevation changes, such as ridges or curbs. The Ninth Circuit acknowledged the evidence that deputies guided wheelchairs over curbs. However, the Ninth Circuit's review of the entire record revealed that the County failed to present evidence that any of the other numerous architectural barriers were addressed in any way. Indeed, Petitioner does not point to any evidence in the record showing that the County effectively addressed architectural barriers other than small surface-elevation changes. Surely if such evidence existed, Petitioner would identify it.

By contrast, Plaintiffs presented virtually unrebutted evidence that architectural barriers were a substantial problem for disabled detainees. One of the class representatives, Timothy Conn, testified that he had to rely on other inmates for assistance when he needed to use inaccessible bathroom facilities. Similarly, Mr. Robertson actually saw detainees – not deputies – streuggling to lift a detainee in a wheelchair over a foot-high retention wall in one of the inaccessible showers. In light of this evidence, the Ninth Circuit held that the district court clearly erred when it concluded that Plaintiffs had failed to show the existence of reasonable accommodations that would enable them to make use of the facilities.

Petitioner arguer that the Ninth Circuit failed to give due deference to the district court's finding that the County's failure to comply with the ADA in certain areas was "within the reasonable requirements of effective prison administration." App. 100. However,

the district court did not cite a single piece of evidence to support this conclusory finding, and Petitioner does not point to any evidence in the record that would support such a finding. The Ninth Circuit noted: "The County did not posit *any legitimate rationale* for maintaining inaccessible bathrooms, sinks, showers, and other fixtures in the housing areas and common spaces assigned to mobility- and dexterity impaired detainees." App. 66 (emphasis added). Further, the Ninth Circuit observed that County counsel's "vague assertions" about the cost of accommodations did not constitute evidence, and "could not be construed as a legitimate basis for failing to comply with the ADA." App. 66-67. Indeed, neither the district court nor Petitioner cites to *any* evidence in the record to support a finding that accommodating disabled detainees would be too costly. For these reasons, the Ninth Circuit appropriately reversed the district court's finding that Plaintiffs had not established the existence of reasonable accommodations that would enable them to make use of the facilities.

2. The Ninth Circuit Correctly Overturned the District Court's Finding With Respect to Access to Programs, Services and Activities

The second supposed error that Petitioner identifies is the Ninth Circuit's holding that the district court clearly erred when it found that disabled detainees had equal access to the programs, services and activities in the Orange County Jails. Petitioner asserts that the Ninth Circuit erred because the County presented "substantial evidence to support the district court's findings related to the availability of programs and services at the Central Jail" to disabled

detainees.[5] However, Petitioner does not cite this "substantial evidence," and points only to three pages of testimony from Captain Board to support the claim that programs, services and activities are equally available to disabled detainees as non-disabled detainees. App. 24 & n.8. Petitioner asserts that Captain Board testified that disabled detainees "have access to" work programs. This is not what Captain Board testified. Here is the entirety of Captain Board's testimony regarding the supposed availability of the Community Work Program to detainees with mobility impairments:

> Q: Is there any reason why a wheelchair-bound inmate who was, otherwise, qualified, i.e., passed whatever physical requirements were necessary for the job, et cetera, would be precluded from that program?
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> A: The – the only thing that I can think of that would preclude someone from participation is someone with a disability, would be a work location that could accommodate that disability.

Ct. App. SER 13210:5-12 (Vol. 44). Captain Board never testified that the Community Work Program – or any other work program – was, in fact, offered to detainees in wheelchairs, or that any wheelchair-bound detainee had ever actually participated in any work program offered by the County. He never testified that the County had identified work locations that could accommodate a disability. At most, he testified to a hypothetical situation – that there was only one reason

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[5]As of 2004, mobility- and dexterity impaired detainees were housed exclusively at the Central Jail, and not at the Musick or Theo Lacy facilities. App. 67-68.

he could think of why a disabled inmate wouldn't be able to participate in a work program. The County simply made no showing that work programs were actually available and offered to wheelchair-bound detainees.

Petitioner further asserts that Captain Board testified that mobility-impaired detainees "have access to" rehabilitation and education programs at the Central Jail. Again, this overstates Captain Board's testimony. Here is the entirety of Captain Board's testimony in these two areas:

> Q: [C]an you tell us what sort of [rehabilitation] programs are offered at the Central Men's Jail, Central Women's Jail?
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> A: They would have things similar to your – your typical Alcoholics Anonymous-type of a program. However, it would be – it could be focused on either alcohol or drugs. They would offer classes, so many classes per week at any of our facilities.
>
> Q: Okay. Other than – than substance abuse programs, what other programs does the Orange County Sheriff's Department offer at the Central Women's Jail and Men's Central Jail?
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> A: They offer education programs. Some inmates work towards their G.E.D.'s while in custody, computer classes, those – those sorts of things.
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> Q: Are any of those classes – are wheelchair-bound inmates precluded from participating in any of those programs?
>
> A: No.
>
> Q: Okay. I think Mr. Conn testified that

someone told him that only sentenced inmates could participate in those programs; is that true?

A: Not to my knowledge.

Ct. App. SER 13211:10-13212:4 (Vol. 44).

Again, Captain Board did not testify that rehabilitation programs or educational classes were in fact offered or made available to wheelchair-bound detainees, or that any such detainees had ever actually participated in such programs. He simply testified that, to his knowledge, wheelchair-bound inmates were not technically precluded from participating. This is far from the showing that is required by the ADA – to wit, that the County "operate[d] each service, program or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 CFR 35.150(a).

More significant, as the Ninth Circuit pointed out based on its review of the entire record, several Sheriff's Department officials testified to the extensive programs, services and activities that are offered to non-disabled inmates at the Theo Lacy and Musick facilities, from which disabled detainees are categorically excluded. "For example, programs in agriculture, woodworking, and welding were among the vocational opportunities available at Musick or Theo Lacy, but not available at the Central Jail Complex." App. 69. Sheriff's Department officials also testified to the extensive recreational opportunities available to non-disabled detainees at Musick and Theo Lacy, including "a softball field, volleyball courts, pool tables, and other indoor and outdoor facilities." *Id.* The Ninth Circuit concluded that the County "has

offered no explanation or justification, either in district court or on appeal, for the significant differences between the vocational and recreational activities available at Theo Lacy and Musick, and those available to either able or disabled detainees at the Central Jail. As such, the County has not raised the defense that a policy of restricting access to these programs, services, or activities is reasonably related to a legitimate government objective." App. 72 (citation omitted).

In the second section of their petition, Petitioner does not even mention the Ninth Circuit's discussion of the programs and services available at Theo Lacy and Musick. Petitioner continues to offer no explanation or justification regarding the significant differences between the programs and services offered to disabled and non-disabled detainees. The County does not point to any evidence offered below showing that the programs and services offered at the Central Jail are similar to the programs and services offered at Musick and Theo Lacy. It does not point to any evidence supporting a legitimate penological justification for the disparity in programs and services offered.[6] On this basis, the Ninth Circuit appropriately remanded the case so that the district court could make further factual findings regarding the feasibility of either redistributing some of the programs from Musick and Theo Lacy to the Central Jail, or determining another

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[6] Petitioner cites Board's testimony that it would be dangerous to house mobility-impaired detainees with the general population, but, as noted above, the Ninth Circuit *upheld* the district court's finding that legitimate penological concerns justified the segregation of disabled detainees. App. 68. Further, the Ninth Circuit *upheld* the district court's finding that legitimate penological concerns justified the exclusion of inmates from the Best Choice program, a rehabilitation program. App. 72 n. 39.

appropriate remedy. The district court clearly erred, and further appellate review is unnecessary.

3. The Ninth Circuit's Decision With Respect to the ADA Issues is not Final Because it Requires The District Court To Make Further Factual Findings

The Court should decline to grant the *certiorari* petition at this time because the Ninth Circuit's decision with respect to the ADA issues is not yet final. The Ninth Circuit ordered the district court to make further factual findings in two areas involving the ADA: (1) Whether any of the programs at the Theo Lacy or Musick facilities could also be offered to disabled detainees at the Central Jail; and (2) The nature and extent of the physical architectural barriers that currently exist, given the time lapse between the trial and the Ninth Circuit's decision. App. 67, 72, 74, 81 (ordering remand for further proceedings). Because the Ninth Circuit ordered further factual findings, it did not order any injunctive relief with respect to the ADA.

It is possible that the district court will make factual findings that will obviate the need for further appellate review in this case. For example, it is possible that Orange County will be able to show that, since the trial in 2005, it has made significant improvements in removing the architectural barriers in the jails. Or, it is possible that Orange County will be able to show that, for legitimate penological reasons, the programs at Theo Lacy and Musick cannot be offered to inmates with disabilities at the Central Jail (or that disabled detainees are now housed at these facilities and participating fully in their program

offerings). If Orange County is able to make either of these showings, the landscape of the ADA issues will change significantly. The Supreme Court should permit the district court to make the additional findings required by the Ninth Circuit and should not grant review at this time.

Further, if the Supreme Court grants certiorari now and affirms the portions of the Ninth Circuit's decision on the ADA, the lower court will have to make further factual findings and then either enter injunctive relief or decline to enter injunctive relief. Either way, it is likely that the losing party will again appeal to the Ninth Circuit for further review of the ADA issues. The Court should avoid "the inconvenience and costs of piecemeal review," and should instead wait until the district court has made the required further factual findings. *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53 (1964).[7]

III. THE NINTH CIRCUIT PROPERLY DELEGATED TO THE DISTRICT COURT RESPONSIBILITY FOR DETERMINING HOW THE COUNTY COULD BEST ADJUST PROGRAM AND SERVICE OFFERINGS TO ACCOMMODATE THE NEEDS OF DISABLED DETAINEES

Petitioner states in the "Question Presented" section that the Ninth Circuit in this case has now held that "the County of Orange violated 42 U.S.C. § 12132 of the Americans with Disabilities Act by not offering to physically disabled inmates housed at one detention

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[7]The Court may, of course, grant certiorari at a later time and review all of the issues that Petitioner raises in the current petition. *Hughes Tool Co. v. TWA*, 409 U.S. 363, 365 n.1 (1973).

facility every program and activity offered at two other detention facilities." Petition, at (i). This statement, however, does not accurately reflect the holding of the Ninth Circuit, which was far narrower, imposed no explicit mandate of program access and delegated to the district court the task of further fact-finding to assess the reasonableness of the County's provision of services and programs to disabled detainees. The actual holding of the Ninth Circuit was not ground-breaking; the court held merely that any program or activity "offered to nondisabled detainees should, when viewed in its entirety, be similarly available to disabled detainees who, with or without reasonable accommodations, meet the essential eligibility requirements to participate," unless the county can establish that "restriction on access is reasonably related to a legitimate government objective." App. 71.

Petitioner does not articulate what basis exists under the Supreme Court Rules for taking this case for review based on this aspect of the opinion. It acknowledges there is no circuit split on this issue. Absent a circuit split on an important matter, this Court may grant *certiorari* in its discretion, where a decision of a United States court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c). Here, Petitioner cannot show that the circuit court's decision is in any conflict with a decision of this Court, much less that it creates a conflict on an important federal question.

In reaching its holding with respect to the ADA claim, the Ninth Circuit closely followed the Supreme Court decision in *Pa. Dep't of Corr. v. Yeskey* 524 U.S. 206, 209, 210 (1998), which held that because the ADA applies to correctional facilities, an inmate cannot be

categorically excluded from a beneficial prison program based on his or her disability alone. App. at 70, citing *Yeskey,* 524 U.S. at 210 ("Modern prisons provide inmates with many recreational 'activities,' medical 'services,' and educational and vocational 'programs,' all of which at least theoretically 'benefit' the prisoners. . . .")

Based on undisputed evidence before the district court, the Ninth Circuit found that disabled detainees were segregated in one facility (the Central Jail complex) and barred from two other facilities (Theo Lacy and Musick) which had superior services, including a drug rehabilitation program ("Best Choice Program"), agriculture, woodworking, and welding, off-site or community work projects, and access to a softball field, volleyball courts, pool tables, and other indoor and outdoor facilities. App. 69.

In no way did the Ninth Circuit impose on the County a strict requirement that it offer every program to every disabled person at every facility. Petitioner's assertion that the Ninth Circuit "held that the ADA does not permit any lack of uniformity" App. 28, is contradicted by the opinion itself, which states in two separate places that the ADA does not require "perfect parity" in program offerings. App. 70, 72. Instead, the Ninth Circuit repeatedly instructed that the evidentiary record needed to be developed and that assessment of the reasonableness of the County's provision of services and programs could not be made until such record was developed.

Further, the Ninth Circuit cautioned the district court against imposing any type of absolute rule on the jails which did not take into account security concerns and the competing needs of its jail population. Indeed,

the Ninth Circuit rejected the very rule that petitioner would have this court believe it adopted. The court stated unequivocally that "[t]he ADA does not require perfect parity among programs offered by various facilities that are operated by the same umbrella institution." App. 70. The court further held that the County need not make all of its existing facilities accessible to individual with disabilities. App. 71. "We also emphasize," the court explained, "that the district court should look at the offerings as a whole and in their entirety and thus the court is not required to ensure that each individual program or service offered at Theo Lacy or Musick is offered in complete parity with an offering at the Central Jail." App. 71-72. Moreover, the court noted that "whether this 'program access' standard may reasonably be met or whether any restriction on access is reasonably related to a legitimate government objective is necessarily fact specific" and remained to be determined by the district court.

The Ninth Circuit did not disapprove of any aspect of the County's actual provision of services and programs beyond stating the incontrovertible opinion that "the County may not shunt the disabled into facilities where there *is no possibility of access to those programs.*" App. 70, (emphasis added). Such a conclusion flows from the *Yeskey* opinion, which applied the ADA to correctional settings. The court did not discount any particular security or correctional concern, or budgetary constraint, pointing out that the County had offered no explanation or justification, either in the district court or on appeal, for the significant differences between the vocational and recreational activities available to disabled and non-disabled detainees. App. 72. Thus, "while the County

has considerable discretion under the regulations to determine whether and how it can extend program accessibility, it cannot simply do nothing," as was the case here. App. 71, n. 38. In reviewing the *one* program for which the County did attempt to rationalize its failure to grant access to disabled detainees, the Ninth Circuit *approved* the governmental objective advanced as legitimate; the Ninth Circuit upheld the district court's finding that the Best Choice Program did not need to be made accessible to the disabled due to security concerns advanced by the County. App. 72.

Petitioner's assertion that the Ninth Circuit's opinion will "compel public entities that operate more than one jail or prison to *drastically reduce or eliminate valuable inmate programs and activities just to avoid ADA claims,"* is extreme and unsupportable. Pet. Brief, at 28. This same argument could have been advanced by colleges and universities facing desegregation orders, that they would close or cease to offer certain courses or programs if to do so would require that non-whites have access. Just as that argument would not have been countenanced fifty years ago in the face of requiring equal access to educational programs, it should not be countenanced in the context of the ADA's requirement that people with disabilities have equal access to the government's programs and services, even in a correctional setting. Under the Code of Federal Regulations, cited repeatedly by the Ninth Circuit, the county retains broad discretion in redistributing programs, altering placement at facilities, or taking other steps to make the County's programs usable by individuals with disabilities, short of curtailing those programs for all

detainees. 28 C.F.R. § 35.150(b).[8]

The D.C. Circuit's decision in *Women Prisoners of the D.C. Dep't of Corrections v. District of Columbia*, 93 F.3d 910 (D.C.Cir. 1996), cited by Petitioner, does not create a circuit conflict, nor support Petitioner's claim that an important federal question is presented here. *Women Prisoners* concerned an equal protection and Title IX claim brought by a class of female prisoners, challenging the District of Columbia's provision of different educational programs to female prisoners than male prisoners. Neither of those issues is presented in the Ninth Circuit decision under consideration. To the extent that the decision is relevant at all, the Ninth Circuit echoed the D.C. Circuit's concern that proper deference should be paid to correctional officials, that all facilities might not need to be brought into parity, and that security and other legitimate governmental concerns may require certain differential treatment of detainees.

Moreover, the D.C. Circuit's handling of the equal protection issues also appears out of step with the Supreme Court's then most recent pronouncement on

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[8] 28 C.F.R. 35.135 provides in pertinent part: "A public entity may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock or other conveyances, or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities. A public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section."

the type of scrutiny to apply to equal protection claims brought by women regarding unequal educational opportunities. *United States v. Virginia,* 518 U.S. 515 (1996). With respect to Virginia's efforts to create a separate military school for women, offering fewer programs and educational opportunities than Virginia Military Institute ("VMI"), which had historically excluded women, this Court held that Virginia had to advance an "exceedingly persuasive justification" for withholding from women the same training provided to their male counterparts. *Id.*, at 555-556. In so ruling, this Court rejected the host of justifications advanced by Virginia for offering parallel but inferior services to women, including that women might not benefit from VMI's intensive program, that facilities might have to be altered to accommodate combining the sexes, or that the existing facilities were comparable. As the Ninth Circuit did here, this Court pointed out the wealth of sports opportunities, playing fields and programing provided male cadets at VMI. Women, by contrast, like disabled detainees in the Orange County Jail system, had to make do with inferior or non-existent programs and facilities. While equality in access to educational programs in correctional institutions presents a far different question than equal access to the preeminent educational institutions of our country, it is difficult to square *Women Prisoner's* analysis of the total lack of access to programming in the D.C. prisons with the equal protection analyses articulated by the majority, and concurring opinions in *Virginia.*

Petitioner's final argument, that the County may eliminate all programs offered to detainees to avoid having to provide them to disabled detainees harkens back to municipalities' threats to close swimming pools and other facilities rather than accept integration as

the law. The threat that a losing party may decide to avoid a decision of the federal courts by abolishing completely the program or institution under review is not reason to grant *certiorari*, since that argument should have no influence on the ultimate resolution of the issues. Indeed, this Court has never shied from any interpretation of the law which imposes substantial costs on governmental entities, nor accepted the argument that the cost of compliance with a federal statute or constitutional provision trumps the basic principles embodied in such laws. This argument, if countenanced, could as easily be made by any governmental entity which provides unequal services and programs to disabled individuals, not just correctional facilities. To accept it as a ground to grant *certiorari* review would allow any public institution, library, public park, or school, to assert a special entitlement to review whenever a circuit court requires that it adjust its programs to provide equal services under the ADA.

CONCLUSION

For the reasons stated herein, the petition for a writ of *certiorari* should be denied.

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COUNTY OF ORANGE,

Petitioner,

vs.

FRED PIERCE, TIMOTHY LEE CONN, FERMIN VALENZUELA, and LAURIE D. ELLERSTON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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TABLE OF CONTENTS

Page

I. THE HOLDING THAT NINETY MINUTES OF WEEKLY EXERCISE IS CONSTITUTIONALLY REQUIRED IS INEXTRICABLY TIED TO THE PROTECTIONS AFFORDED BY THE EIGHTH AMENDMENT 1

II. THE REVERSALS OF THE DISTRICT COURT'S ADA-RULINGS CANNOT BE RECONCILED WITH THE RELEVANT RECORD AND THE CONTROLLING STANDARD OF REVIEW 4

A. The Affirmance Of The District Court's Other Rulings Exemplifies The Proper Application Of The Controlling Standard Of Review 5

B. The District Court's ADA-Related Rulings Were Based On Its Evaluation Of The Relevant And Competing Evidence And Should Therefore Not Have Been Disturbed 6

III. THE LONG-TERM CONSEQUENCES OF REQUIRING PROGRAM PARITY THROUGHOUT UMBRELLA ORGANIZATIONS SHOULD NOT BE DOWNPLAYED 9

IV. THE REMANDING OF THIS ACTION FOR FURTHER FACTUAL FINDINGS ON ADA ISSUES IS ANOTHER REASON FOR GRANTING CERTIORARI 11

V. CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 105 S.Ct. 1504 (1985) 7

Barney v. Pulsipher, 143 F.3d 1299 (10th Cir. 1998) 2

Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861 (1979) 3

Berg v. Kincheloe, 794 F.2d 457 (9th Cir. 1986) 2

Craig v. Eberly, 164 F.3d 490 (10th Cir. 1998) 2

Jones v. Johnson, 781 F.2d 769 (9th Cir. 1986) 2

Jurado v. Beggs, 2008 WL 4191387 (W.D. Okla. 2008) 1

Redman v. County of San Diego, 942 F.3d 1435 (9th Cir. 1991) (en banc) 3

Robertson v. Montgomery County, 2006 WL 1207646 (M.D. Tenn. 2006) 3

Thompson v. County of Medina, Oh., 29 F.3d 238 (6th Cir. 1994) 3

Turner v. Spence, 2008 WL 927709 (E.D. Cal. 2008) 3

Women Prisoners of the D.C. Dep't of Corrections v. District of Columbia, 93 F.3d 910 (D.C. Cir. 1996) 10

I. THE HOLDING THAT NINETY MINUTES OF WEEKLY EXERCISE IS CONSTITUTIONALLY REQUIRED IS INEXTRICABLY TIED TO THE PROTECTIONS AFFORDED BY THE EIGHTH AMENDMENT.

Respondents contend that the many cases where other Circuits have admonished against bright-line rules regarding exercise in the penological setting and have rejected similar exercise-related challenges should be disregarded because the Ninth Circuit below did not use the phrase "cruel and unusual punishment." The suggestion that cases involving convicted prisoner's exercise-related claims should be ignored is unfounded; for purposes of assessing the constitutionality of exercise time-related procedures, the fundamental constitutional standard is substantively one and the same. *See*, *Jurado v. Beggs*, 2008 WL 4191387, *3 (W.D. Okla. 2008) ("the court has not adopted a set weekly total for regular or daily exercise for *detainees/inmates*, nor has the court recognized a constitutional right to outdoor exercise for detainees") (emphasis added).

Indeed, the Ninth Circuit did not draw sharp distinctions between the analysis of the exercise-based claim in this case from similar claims brought under the Eighth Amendment and explained that pretrial detainees are protected by "specific substantive guarantees of the federal Constitution, such as the First and *Eighth* Amendments" and that "[e]xercise is one of the *basic human necessities* protected by the *Eighth* Amendment." (App. 29, 46;

emphasis added.) The Ninth Circuit's conclusion that 90 minutes of weekly exercise "does not give meaningful protection to this *basic human necessity*" is unquestionably grounded in well-established Eighth Amendment law relating to the constitutional threshold dictated by "basic human necessities." *See, Barney v. Pulsipher,* 143 F.3d 1299, 1310 (10th Cir. 1998) (the Eighth Amendment requires jail officials to provide conditions of confinement that ensure the "basic necessities of adequate food, clothing, shelter, and medical care"); *see also*, *Berg v. Kincheloe*, 794 F.2d 457, 459 (9th Cir. 1986) (both the Eighth and Fourteenth Amendments "prohibit the infliction of 'cruel and unusual' punishment"). Thus, the Ninth Circuit's analysis and attendant holding that providing pretrial detainees with 90 minutes of dedicated exercise time results in actionable and unconstitutional "punishment," are inextricably tied to longstanding constitutional parameters under the Eighth Amendment.

Respondents overlook the significance of this inextricable connection between a pretrial detainee's constitutional rights and the Eighth Amendment's protection of all inmates' basic human necessities. Indeed, it is well-established that although a pretrial detainee's claim "arises under the due process clause, the [E]ighth [A]mendment guarantees provide a *minimum* standard for determining [his] rights as a pretrial detainee." *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986) (emphasis added); *Craig v. Eberly*, 164 F.3d 490, 495 (10th Cir. 1998) ("Although the Due Process Clause governs a pretrial detainee's claim of

unconstitutional conditions of confinement . . . *the Eighth Amendment standard provides the benchmark for such claims. . . .*") (citing *Bell v. Wolfish*, 441 U.S. 520, 535, 99 S.Ct. 1861 (1979) (emphasis added); *Turner v. Spence*, 2008 WL 927709, *6 (E.D. Cal. 2008) ("pretrial detainees' Fourteenth Amendment rights are analogized to the rights of prisoners under the Eighth Amendment") (citing *Redman v. County of San Diego,* 942 F.3d 1435, 1441-1445 (9th Cir. 1991) (en banc); *Thompson v. County of Medina, Oh.*, 29 F.3d 238, 242 (6th Cir. 1994) (pretrial detainees are "entitled to the same Eighth Amendment rights as other inmates"); *Robertson v. Montgomery County*, 2006 WL 1207646, *1 (M.D. Tenn. 2006) ("claims brought by pretrial detainees challenging conditions of confinement are analyzed under the Eighth Amendment").

Since the Eighth Amendment establishes the minimum standard for examining the conditions of confinement in the pretrial detention context, this vast legal backdrop should not be ignored in determining the potential impact of the Ninth Circuit's holding that providing pretrial detainees with 90 minutes weekly of dedicated exercised time "constitutes punishment for purposes of § 1983." (App. 49.) Moreover, the inability to reconcile the Ninth Circuit's holding from those in the many cases where similar exercise claims have been rejected should not be brushed aside as Respondents suggest. The fundamental principles at issue are the same, regardless of whether the claim is brought under the Eighth or

Fourteenth Amendments. The Ninth Circuit's holding, therefore, should not be compartmentalized in this fashion but scrutinized in this broader and more meaningful constitutional context.

II. THE REVERSALS OF THE DISTRICT COURT'S ADA-RULING CANNOT BE RECONCILED WITH THE RELEVANT RECORD AND THE CONTROLLING STANDARD OF REVIEW.

Proper application of the "clearly erroneous" standard requires substantial deference to the district court, and prohibits the court of appeals from substituting its own judgment for that of the district court. Accordingly, when applying the "clearly erroneous" standard, a court of appeals may not reverse a district court's judgment based on disagreements as to the weighing and interpretation of the evidence, including witness credibility determinations.

The specific substance of the District Court's rulings – issued after a six-day bench trial – cannot be reconciled with Respondents' insistence that the Ninth Circuit's reversals of the District Court's factual findings and conclusions of law did not violate this longstanding standard of review. If anything, the portions of the record Respondents cite demonstrate how the Ninth Circuit did not afford the District Court the substantial deference to which it was entitled, and reversed the subject rulings based on its

disagreement with the District Court's interpretation of the competing evidence presented at trial.

A. The Affirmance Of The District Court's Other Rulings Exemplifies The Proper Application Of The Controlling Standard Of Review.

The Ninth Circuit affirmed most of the District Court's rulings, ranging from case management and pretrial issues to the finding in favor of Petitioner on 12 of the 14 *Stewart* injunctive orders. The affirmance of these rulings reflected the appropriate application of the "clearly erroneous" standard of review. For example, with respect to the two *Stewart* orders pertaining to the provision of seating while awaiting transport to or from court and time for meals, the Ninth Circuit did not independently weigh the competing evidence presented in the District Court, or substitute its own judgment for that of the District Court. Rather, Ninth Circuit observed that Petitioner presented evidence showing that it had actively sought to provide adequate meal time and seating in holding cells, and that such evidence was a sufficient basis on which to support the District Court's judgment. (App. 36-37.)

The Ninth Circuit, however, did not exercise similar restraint in ruling on the ADA issues. There is in fact a marked contrast between the Ninth Circuit's treatment of the record with respect to these two *Stewart* orders – where the Ninth Circuit appropriately

observed that certain evidence was presented and determined that such evidence supported the District Court's finding – and its treatment of the record in ruling on the ADA issues, where the Ninth Circuit inappropriately disregarded the District Court's assessment of the strengths, weaknesses, and weight of the competing evidence presented at trial. While the former approach embodies a proper application of the "clearly erroneous" standard, the latter does not. Indeed, this disparate treatment of the record highlights the Ninth Circuit's erroneous review and reversal of the District Court's ADA-related rulings.

B. The District Court's ADA-Related Rulings Were Based On Its Evaluation Of The Relevant And Competing Evidence And Should Therefore Not Have Been Disturbed.

Respondents argue that the Ninth Circuit correctly ruled that the District Court's findings were clearly erroneous, citing a few excerpts of trial testimony. Respondents' argument, however, cannot overcome the fact that the District Court concluded that Respondents had failed to make "the rest of the required showing" to prevail on their ADA-based physical barrier claim and that "the defense showed other effective remedies are in use, and decisions are being made concerning structural modifications in keeping with effective prison administration and based on legitimate penological interests." (App. 101.) The District Court also found of "limited value"

Respondents' purported expert witness, Peter Robertson,[1] whose testimony did not address key factual topics and offered "no analysis of accessability [*sic*] to programs or mainstreaming." (App. 100, n.7.) These highly probative conclusions – reached after presiding over a six-day bench trial during which 26 witnesses testified – should not have been disturbed.

Respondents' limited citations to the record only further demonstrate how the Ninth Circuit improperly weighed competing evidence and substituted its own judgment for that of the District Court. For example, Respondents refer to Mr. Robertson's testimony that certain architectural changes could be made to accommodate disabled inmates (the same testimony cited by the Ninth Circuit in its opinion). The District Court, however, found that Mr. Robertson's testimony consisted of "broad, conclusory statements" that did not justify injunctive relief because there was no analysis or cost study accompanying the

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[1] Despite the District Court's explicit discounting of the probative value of Mr. Robertson's testimony, the Ninth Circuit repeatedly pointed to his assertions regarding purported architectural deficiencies. (App. 61, 62, 64-66.) Not only was reversing the District Court's findings based on a divergent impression of Mr. Robertson's testimony improper, the Ninth Circuit did not mention the fact that Mr. Robertson was a self-professed "accessologist" and was not certified or licensed by any professional organization. (Ct. App. SER 12634:24-12636:1 [Vol. 41].) *See, Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-574, 105 S.Ct. 1504 (1985) (explaining at length the impropriety of disregarding the district court's factual and credibility determinations).

testimony. (App. 100.) Respondents have not pointed to any analysis or cost study outside of these "broad, conclusory statements," and neither have they cited to any portion of the record that would demonstrate that the District Court clearly erred by finding Mr. Robertson's testimony to be insufficiently persuasive and specific. While Respondents (and the Ninth Circuit) may disagree with the District Court's assessment of the probative value of Mr. Robertson's testimony, under the "clearly erroneous" standard, disagreement as to the weight of the competing evidence does not justify reversal of the trier-of-fact's factual findings.

The testimony of Captain Board with respect to programs and services available to disabled inmates is further evidence of the Ninth Circuit's inappropriate manner of review. The cited testimony clearly indicates that Captain Board established that disabled inmates have access to work, rehabilitation and education programs. (Ct. App. SER 13204-13206, 13209-13211 [Vol. 44].) That the District Court found persuasive Captain Board's testimony in reaching its conclusion that "[t]he facts taken as a whole show the County is acting in a reasonable manner, making programs accessible and usable, with due regard to legitimate penological interests" should not have subjected the ruling on the program-related ADA claim to reversal. Simply put, the District Court's finding against Respondents on this claim did not come close to being contrary to the record; rather, the District Court's ruling was a direct manifestation of

its evaluation of the merits and implications of the competing evidence at trial. Such rulings should not be reversed based on a court of appeals' belief that the evidence was wrongly interpreted.[2]

III. THE LONG-TERM CONSEQUENCES OF REQUIRING PROGRAM PARITY THROUGHOUT UMBRELLA ORGANIZATIONS SHOULD NOT BE DOWNPLAYED.

Review is also warranted because the Ninth Circuit, admittedly without any supporting case law authority, held that umbrella organizations could not "exclude the disabled from particular facilities with superior programs and services" and that "[a]ny type of educational, vocational, rehabilitative, or recreational program, service, or activity offered to nondisabled detainees should, when viewed in its entirety, *be similarly available to disabled detainees who, with or without reasonable accommodations, meet the essential eligibility requirements to participate*." (App. 71; emphasis added.) This holding establishes an extremely burdensome threshold for ADA compliance

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[2] Recently, the Ninth Circuit took an additional step to cement the reversal of the District Court's factual findings. On October 24, 2008, the Ninth Circuit entered an order for the Court Commissioner to recommend an attorneys' fees award as to the issues that Respondents "prevailed" on appeal, including the ADA claims. Respondents, obviously, could not be treated as prevailing parties on these claims if this Court were to grant review of the Ninth Circuit's application of the clearly erroneous standard of review to the District Court's ADA rulings.

for any public entity that operates more than one facility at which programs and services are offered (to disabled and nondisabled persons).

Respondents seek to downplay the broad practical consequences of this holding by noting that the Ninth Circuit explained that the District Court "is not required to ensure that each individual program or service offered at Theo Lacy and Musick is offered in complete parity with an offering at the Central Jail [where disabled inmates are housed]." (App. 71-72.) This narrow exception – that *complete parity is not required* – to the broad declaration that programs and services offered to nondisabled persons must be made "similarly available" to disabled persons who are qualified to participate, with or without reasonable accommodations, is not a meaningful exception. The definition of "similarly available" is murky at best, and public entities, like Petitioner, will invariably face the choice of eliminating programs and services or repeatedly defending themselves in protracted and resources-draining ADA lawsuits. In *Women Prisoners of the D.C. Dep't of Corrections v. District of Columbia*, 93 F.3d 910 (D.C. Cir. 1996), the D.C. Circuit recognized the vagaries of this difficult dilemma in explaining that jail officials "may well respond by reducing, to a constitutional minimum, the number of programs offered to all inmates." *Id.* at 925.

The Ninth Circuit's approach is in direct contrast to that of the D.C. Circuit, and Respondent submits that granting certiorari will enable this Court to provide umbrella public organizations throughout the

country with much-needed guidance on how to reconcile requirements under the ADA with the practical reality of servicing individuals at multiple facilities, where uniformity of programs and activities is infeasible and impracticable.

IV. THE REMANDING OF THIS ACTION FOR FURTHER FACTUAL FINDINGS ON ADA ISSUES IS ANOTHER REASON FOR GRANTING CERTIORARI.

Respondents also argue that the review should not be granted because the Ninth Circuit's decision regarding the two ADA issues is not final in that the Ninth Circuit remanded this case for further fact-finding: (1) to determine current state of the physical barriers to "areas to which disabled persons should have access" and to order required remedial measures; and (2) to determine the programs and activities to which disabled persons have access and to order remedial measures to make programs and services accessible to mobility and dexterity-impaired inmates. (App. 87.) This remand order essentially mandates a retrial on these ADA issues after the Ninth Circuit has already found Petitioner has "violated the ADA." (App. 81.)

This procedural posture (with a looming re-trial on these ADA issues) cannot be reconciled with Respondents' contention that this Court should refrain from granting certiorari at this juncture. Indeed, the further fact-finding required by the Ninth Circuit

provides even more reason for granting review now. As Respondents, themselves, point out, should the parties expend the time and effort required by another trial, the unsuccessful party is likely to appeal the outcome to the Ninth Circuit "for further review of the ADA issues." (Opp. at 24.) Such an appeal, and the re-trial on ADA issues, could be avoided if this Court were to grant certiorari and review the propriety of the Ninth Circuit's reversal of the District Court's rulings as to these ADA claims. Thus, the Ninth Circuit's remand instructions only further magnify the necessity for review at this juncture, as opposed to a much later stage, by which time the parties and the District Court will have had to exhaust significant resources to comply with the Ninth Circuit's directions on remand.

V. CONCLUSION

The petition for writ of certiorari should therefore be granted.

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